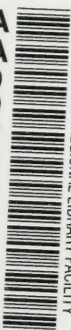


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A TREATISE

ON

The Federal Employers'  
Liability and Safety  
Appliance Acts

*With Similar State Statutes and Federal Statutes  
on Hours of Labor*

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SECOND EDITION

---

BY

W. W. THORNTON

Of the Indianapolis Bar, Author of Oil and Gas,  
Pure Food and Drugs, etc.

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CINCINNATI, OHIO  
THE W. H. ANDERSON CO.

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## PREFACE TO SECOND EDITION.

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It is now three years since the first edition of this work was issued. The Federal Employees' Liability statute was then less than a year old; and while there were several decisions construing several provisions of the unconstitutional Act of 1906, there was none construing this Act of 1908. The ground, therefore, to be ploughed was virgin soil. Since then this Act of 1908 has been before quite a number of courts, whose opinions construing it, in many of its parts, have been published.

The constitutionality of the Statute has been firmly settled. The only dissenting voice is that of the Supreme Court of Connecticut, whose decision has been very severely criticised by the courts, and in an able report of the Judiciary Committee of the Senate of the United States in 1910. The Statute was amended in 1910 in two important instances. There is no longer any serious doubt that, under this Statute as amended, state courts now have jurisdiction over actions brought under this statute to recover damages.

The courts also have fully settled the question that an interstate employee, in suing an interstate railroad company, to recover damages for injuries he has sustained while in the employment of such company, is entitled to bring his action under this Statute, and that such railroad company can not insist its liability shall be measured by a statute of the state wherein the accident occurred. And possibly the courts will hold that such an employee must bring his action under this Statute, and not under a state statute. This question, however, remains to be settled.

As nearly all of the employees engaged in moving traffic of a railroad company are interstate employees, the importance of this Statute is quite manifest to all who are concerned in litigation to recover damages for injuries sustained by a railroad employee.

Since this work was first published, there have been many decisions construing the Safety Appliance Act. Its construction has been settled by three decisions of the United States Supreme Court, and its constitutionality determined. According to two decisions of that court, this Statute applies to intrastate cars moved in a separate train over a railroad, which is "a highway of interstate commerce;" and that the Statute, as thus construed, is constitutional. Any one can readily see that this is a far-reaching result in constitutional law.

A number of opinions of courts were inserted in the first edition of this work as unreported decisions or opinions. Since this work was first published most of the opinions have been published in the Federal Reporter, but it has been deemed advisable by the Author to retain these opinions, giving the volume and page of that publication, where they can be found. However, a number of opinions are inserted in this second edition, which have not yet been published, and which probably never will be. The Interstate Commerce Commission have kindly furnished these to the Author.

The Federal Statute on hours of labor for interstate employees has been discussed in the last chapter of this work. The decisions construing it are of rather recent date.

A number of states have adopted statutes wiping out the defense of contributory negligence,—following the Federal Statute—and the author has collected these in the last appendix to this work.

The Statute of the United States concerning hours of labor, interstate employees or interstate railroads, is discussed at length.

W. W. THORNTON.

Indianapolis, February 1, 1912.







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PART I.

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Federal Employers' Liability Act



# Federal Employers' Liability and Safety Appliance Acts

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## CHAPTER I.

### ABOLITION OF FELLOW SERVANT RULE.

#### SECTION.

1. Object and purpose of Act of 1908.

#### SECTION.

2. Rule of fellow servant in European countries.  
3. Quebec and Mexico.

§ 1. **Object and Purpose of Act of 1908.**—On the floor of the Senate, Senator Doliver thus explained the object and purpose of the Act of 1908:

“First, it modifies the old law of the negligence of co-employees. The old law, which took root in the United States two generations ago, was to the effect that an employe injured by the negligence of a fellow workman could not recover. \* \* \* The proposition was that an employe injured by the negligence of a fellow servant could not recover. This bill abolishes that doctrine, and gives the employe the right to recover for injuries arising from the negligence of his fellow workmen. That is the first proposition.

The second proposition modifies the law whereby in other generations workmen were held by the court to assume the risks arising from defective machinery. That was an



inheritance, I reckon, of the common law, and at the time the courts originally established the doctrine, it had some sense in it and a little justice. There was some reason why a man working with simple machinery should look to it that the machinery with which he worked was in good order. But the doctrine is obsolete as applied to the present day occupations of those workmen who were employed by the common carriers of the world. It would require a brakeman to know all about the machinery of a freight train, though it may be half a mile long, as he goes out upon his day's work. Everybody with a moderate sense of justice must see that the common law applicable to the assumption of risks for deficient machinery has no rational application to the complex industrial concerns of our own time.

In the third place, this proposed statute modifies radically the law of contributory negligence. As administered by our courts, it has been uniformly held that an employe suffering an injury to which his own negligence contributed, cannot, by reason of that participation in the injury, have any recovery at law. The proposed statute liberalizes the doctrine of the law. It is based upon the theory that where an injury occurs partly by reason of the negligence of the employer and partly by reason of the negligence of an employe, the jury ought to determine what portion of the injury arises from the negligence of the plaintiff, and take away from the sum total of his damage allowed that part which can properly be apportioned to his own negligence. That principle has been called in some of the books the doctrine of comparative negligence.

In the fourth place, the proposed bill undertakes to modify somewhat the common law applicable to certain agreements or contracts made between employers and their workmen, in which the latter agree, in consideration of some form of insurance or indemnity fund, to give up the right to sue in the courts. It has been held, as a matter of public policy, that a workman cannot contract himself out of his right or the rights of his legal representatives to recover

for damages. That is to say, the courts have held that it is against public policy to sustain a contract by which a workman, merely by consideration of his wages and his employment, agrees to withhold any claims for damages in case of his injury. But many insurance societies have grown up in connection with the protection of our railways, which not only undertake to pay a man for damages arising out of injuries, but have also certain other features in the nature of sick benefits and other insurance. They have been regarded by the courts as valid and binding agreements. This proposed law means simply that where a workman sues for injury for which he is entitled to recover, he shall not have his recovery defeated by reason of one of these insurance agreements; but it also says that in case the railway has contributed anything to the insurance fund which he has enjoyed, the amount that the railway has contributed shall be deducted in the calculation of the damages which he is entitled to recover.

These are the four propositions contained in this bill, and I have an idea that there is not a member of the Senate who does not recognize the equity and justice involved in all four of them.

The fact is, we have been at least a generation behind the whole world in the adoption of the doctrines and principles to which I have referred. Outside of England, there has not in modern times been a country in Europe that does not now give its workmen all the advantages that are provided by this bill. There is hardly an American state in these recent years which has not taken this step forward in industrial justice.

The codes of nearly all the countries in Europe were derived, directly or indirectly, from the civil law, and wherever the civil law crossed the water, these doctrines which we are introducing into the United States Courts in this bill have found acceptance. This is so in the courts of Quebec.

The recent English compensation acts illustrate the present day reaction against the severity of the common law. The

fact is that every country in the world has been engaged in the careful study of the relations of its working millions to its prosperity, and to its civilization, and this bill proposes to do for workmen seeking the protection of the courts of the United States, what the enlightened jurisprudence of all the modern nations has already done for their workmen under similar conditions."<sup>1</sup>

**§ 2. Rule of fellow servant in European countries.**—The rule of the common law respecting the liability of the master to his servant for damages occasioned by an injury inflicted by the negligent act of his fellow servant, does not obtain in any European countries having the Civil Law for

<sup>1</sup> 60 Cong. Record, 1st Sess., p. 4527. "The passage of the original act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to change radically, as far as congressional power can extend, those rules of the common law which the president, in a recent speech at Chicago, characterized as 'unjust.' President Taft, in his address at Chicago, September 16, 1909, referred 'to the continuance of unjust rules of law exempting employers from liability for accidents.' The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions, and is based not alone upon the failure of those who are in the United States, but their failure in other countries as well. Mr. Asquith, present Prime Minister of England, said that it was 'revolting to sentiment and judgment that men who met with accidents through the necessary exigencies of daily occupation, should be a charge upon their own families.'" Senate Report 432, 61st Congress, 2d Sess., March 22, 1910, p. 2.

"The primary object of the act was to promote the safety of em-

ployes of railroads while actively engaged in the movement of interstate commerce, and is well calculated to subserve the interests of such commerce by affording such protection; there being, as it seems, a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object." *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 Fed. 949. See also *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660; *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893, and *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942.

It was evidently not the purposes of Congress to prevent negligence on the part of interstate employes; for if that had been the purpose it would have provided for the liability of an engineer or the railroad company for an injury to a passenger on a highway, struck through the negligence of the interstate employe. Evidently the purpose of the Act is to create a right of action against a railroad company in favor of an employe for injuries sustained by him while engaged in interstate commerce.

It may be remarked that there is, strictly speaking, no Federal

the basis of their own laws. The Code Napoleon made the employer answerable for all injuries received by his workmen,<sup>2</sup> and this code is still in force in Belgium and Holland. In Italy and Switzerland, the doctrine of fellow servant does not prevail.<sup>3</sup> Nor does it in Germany and Austria,<sup>4</sup> not in the latter country at least since 1869.<sup>5</sup> In 1888, England adopted a statute which abolished the rule of fellow servant with reference to the operation of railroad trains, and in 1897 it extended the law so as to apply to many of the hazardous employments of that country.<sup>6</sup> In the English Workman's Compensatory Act of 1906,<sup>7</sup> contributory negligence does not defeat the workmen's rights to recover damages, or compensation, but "if it is proved that the injury to the workmen is attributable to the serious and willful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disability, be disallowed."<sup>8</sup>

law of negligence, the Federal courts simply applying the law of negligence as a part of the state law where the injury was occasioned. This is true of the doctrine of *respondeat superior*. It is considered that this act for the first time creates a substantive right in favor of one party against another, based on the proposition that there is a right of action.

<sup>2</sup> Dalloz, 1841, 1st partie, p. 271.

<sup>3</sup> 5 Law Quarterly Review, 184.

<sup>4</sup> 9 Jurid. Rev. p. 271.

<sup>5</sup> Cong. Record, 60 Cong. Record, 1st Sess., p. 4435.

For an excellent review of the law of negligence as applied to master and servant in Continental countries, and a short review of the Act of 1908, see the address of Hon. Addison C. Harris before the Indiana State Bar Association, July 7, 1909, published in the proceedings of that Association for the year 1909. See also the report of the Committee on Jurisprudence before the same Association July 6,

1910, read by Mr. Harris, as well as the discussion following.

<sup>6</sup> See Appendix C.

<sup>7</sup> 6 Edw. VII Cap. 58.

<sup>8</sup> See Ruegg's Employer's Liability, 338. See also Thomas v. Quartermain, 18 Q. B. Div. 693; Griffiths v. Dudley, 9 Q. B. Div. 357; Stuart v. Evans, 31 W. R. 705.

Referring to the argument in favor of the fellow-servant rule as declared by the courts of this country and England, it has been observed by an eminent authority: "If, in countries where the doctrine of common employment has been more or less circumscribed, none of the evil results which it is declared to have obviated can be detected, it may be safely concluded that no harm would have been produced if the doctrine had never been applied, and that no harm will result if it should be entirely abrogated by the legislature—the only authority by which such a change in the law can now be affected." Labatt, Master and Servant. 2 vol., p. 1325.



§ 3. **Quebec and Mexico.**—The doctrine of fellow servant does not obtain in Quebec, in that respect following the French law yet there in force;<sup>9</sup> but in Ontario and the remainder of British North America, the rule does yet obtain.<sup>10</sup> In a case brought in a Circuit Court of the United States to recover damages for an injury received in the Province of Quebec, the court enforced the doctrine concerning fellow servant that prevails in that province.<sup>11</sup> In Mexico, the master is liable to his servant for an injury caused by the negligence of a fellow servant.<sup>12</sup>

<sup>9</sup> *Canadian Pac. Ry. v. Robinson*, 14 Can. S. C. 105, 115; *City Demolombe*, Vol. 31, No. 368, and *Sourdat*, Vol. 2, No. 911. See *Fuller v. Grand Trunk Ry. Co.*, 1 Low Cas. L. J. 68; *Bourdeau v. Grand Trunk Ry. Co.* 2 Low Cas. L. J. 186, and *Hall v. Canadian, etc., Co.* 2 Montreal L. N. 245.

<sup>10</sup> "According to the French law common employment is no defense, and does not exonerate the employer from liability for the negligence of a servant who may by his negligence have caused an accident from which another servant has suffered." *Asbestos, etc., Co.*

*v. Durand*, 30 Can. S. C. 285; *The Queen v. Grenier*, 30 Can. S. C. 42; *The Queen v. Filion*, 24 Can. S. C. 482, affirming 4 Can. Exch. 134; *Belanger v. Riopel*, 3 Montreal S. C. 198.

<sup>11</sup> *Boston, etc., R. Co. v. McDuffey*, 25 C. C. A. 247; 51 U. S. App. 111; 73 Fed. Rep. 934.

<sup>12</sup> *Mexican Cent. R. Co. v. Knox*, 114 Fed. Rep. 73; 52 C. C. A. 21; *Mexican Cent. R. Co. v. Sprague*, 114 Fed. Rep. 544; 52 C. C. A. 318. See also *Mexican Cent. R. Co. v. Glover*, 107 Fed. Rep. 356; 46 C. C. A. 334.

## CHAPTER II.

### CONSTITUTIONALITY OF STATUTE—EFFECT ON STATE LEGISLATION.

#### CONSTITUTIONALITY.

##### SECTION.

4. Power of Congress to increase liabilities of master.
5. Authorizing a recovery for negligent act of fellow servant.
6. Basis of rule of master's non-liability for negligence of a fellow servant.
7. Validity of statute allowing a recovery for an injury occasioned by a fellow servant's negligence.
8. Validity of statute as to past contracts of employment.
9. Limiting statute to employees of railroad companies — Fourteenth Amendment.
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11. Power of Congress to enact statute of 1908.

##### SECTION.

12. Constitutionality of Wisconsin and Nebraska statutes.
13. Invalidity of Act of 1906.
14. The parts of the Act of 1906 rendering it invalid.
15. Congress can only legislate concerning interstate commerce.
16. Effect of Act of 1908 on State legislation.
17. Effect of Act of 1908 on State legislation, continued.
18. Result of decisions.
19. Must interstate employee bring his action on the statute.
20. Act of 1906, validity in District of Columbia and Territories.
21. Construction of statute.

**§ 4. Power of Congress to increase liabilities of master.**—The validity of statutes increasing or changing the liability of a master to his servant, is one that presents itself at an early stage in the discussion of the question of his liability under this Federal Employers' Liability Act. This question presents itself in three aspects:

*First*—The power of Congress to change or modify the liability at common law of a master to his servant, concerning his liability for the negligence of his fellow servant.

*Second*—The power of Congress to enact a law author-



izing a recovery when the servant has been guilty of negligence contributing to his injury.

*Third*—The power of Congress to legislate upon any phase of the relation of master and servant.

**§ 5. Authorizing a recovery for negligent act of fellow servant.**—In discussing the power of a Legislature to change the law with reference to the liability of a master to his servant—not taking into consideration that Congress must limit the scope of its legislation to masters and servants engaged in interstate commerce—decisions of state courts are by analogy available. The doctrine that a master is not liable to his servant for an injury inflicted upon him by the negligence of his fellow servant is a rule of law enunciated and enforced by the courts without any legislative sanction, adopted by them from a supposed or assumed public policy. This rule was announced in England in 1837,<sup>1</sup> in South Carolina in 1838,<sup>2</sup> in Massachusetts in 1842,<sup>3</sup> and in Pennsylvania in 1854.<sup>4</sup> In Massachusetts, the conclusion reached was upon what had been decided in South Carolina and England.<sup>5</sup>

**§ 6. Basis of rule of master's non-liability for negligence of fellow servant.**—In South Carolina, the basis for the rule assumed by the Supreme Court, holding the master not liable to his servant for injuries inflicted by the negligence of his fellow servant, is that the injured servant had entered into a joint undertaking with his fellow with a common employer or master, each having stipulated for the performance of his several part; and as each of them was not liable to the master for the conduct of the other, conversely the master was not liable to one for the conduct of the other,

<sup>1</sup> *Priestly v. Fowler*, 3 M. & W. 1.

<sup>2</sup> *McMurray v. So. Car. R. R. Co.* 1 McMullen, 385; 36 Am. Dec. 268.

<sup>3</sup> *Farwell v. Boston, etc., R. Co.* 4 Metc. 49; 38 Am. Dec. 339.

<sup>4</sup> *Ryan v. Cumberland Valley R. Co.* 23 Pa. St. 384.

<sup>5</sup> The rule was adopted in New York in 1851. *Coon v. Utica, etc., R. Co.* 5 N. Y. 492.

but was, when he was not at fault, only liable to his servant for his wages.<sup>6</sup>

In Massachusetts the question was put upon the ground of implied contract,—that the contract of employment implied upon the part of the servant that he assumed all risk arising from the negligence of his fellow; and this exemption was declared to rest upon considerations of public policy. “Where several persons,” said the court, “are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectively secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.” Speaking of servants employed in different departments, and applying the rule to them, the court further said: “When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary the circumstances of each case.”<sup>7</sup> The master is not exempt from liability, in such case, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any

<sup>6</sup> *Murray v. So. Car. R. Co.* 1 McMul, 385; 36 Am. Dec. 268.

<sup>7</sup> Was not this language prompted by an unwillingness of the court to undertake an investiga-

tion into the conditions of each case, and award or withhold damages as the facts of each particular case would demand as a matter of justice and right?

one but himself;<sup>8</sup> and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand in the relation of a stranger, but is one whose rights are regulated by contract, express or implied.”<sup>9</sup> In Indiana, in 1855, the Supreme Court said: “It is considered that public policy requires that servants engaged in common employment shall not have an action against their principal for injuries resulting from the negligence of one or more of such servants, because the tendency of such a doctrine is to make them anxious and watchful and interested for the faithful conduct of each other, and careful to induce it, while the opposite doctrine would tend in a different direction.”<sup>10</sup> The safety and welfare of the public, therefore, demand the establishment of the principle of the non-liability on the part of the employer in such case;<sup>11</sup> while, when established, it can work no injury to the servant,<sup>12</sup> because his entering upon the service is voluntary,<sup>13</sup> is with a knowledge of its hazards, and with a power and right to demand such wages<sup>14</sup> as he should deem compensatory.”<sup>15</sup> The doctrine of *Priestly v. Fowler*<sup>16</sup> was stated by Baron Alderson in a subsequent case in these words: “They have both engaged in a common service, the duties of which impose a certain risk on each of them, and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow servant and not of his master.” “He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow servant,

<sup>8</sup> Where was the authority to say there was an implied contract? Did not the court merely assume there was such contract?

<sup>9</sup> *Farwell v. Boston, etc., R. Co.* 4 Metc. 49; 38 Am. Dec. 339.

<sup>10</sup> This is a strange assumption in view of the law on the subject in Continental Europe.

<sup>11</sup> Experience of long years' duration shows that the public in Western Continental Europe are as safely cared for as in England and much more so than in America, as against the carelessness of servants.

<sup>12</sup> Experience shows that it does, until legislature after legislature has been compelled to modify the harsh rule announced by these decisions.

<sup>13</sup> True only in a limited sense, because of the pressure that modern civilization thrusts upon the laboring man to secure for himself and family the sustenance of life.

<sup>14</sup> The supply of labor fixes the wages.

<sup>15</sup> *Madison, etc. R. Co. v. Bacon*, 6 Ind. 205.

<sup>16</sup> 3 Mees & Wels, 1.

and he must be supposed to have contracted on the terms that, as between himself and his master, he would run the risk, 'a risk which he' must be taken to have agreed to run when he entered into the defendant's service." "The principle is," Baron Alderson again said, "that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in the discharge of his duty as servant of him who is common master of both."<sup>17</sup>

**§ 7. Validity of statute allowing a recovery for an injury occasioned by a fellow servant's negligence.**—From an examination of the cases quoted and cited in the foregoing section, it will be seen that the cases rest upon practically two grounds: That it is against public policy to allow a servant to recover damages occasioned by the negligence of his fellow

<sup>17</sup> *Hutchinson v. York, etc., R. Co.* 5 Exch. 343; 14 Jur. 837; 19 L. J. (Exch.) 296.

The English rule was forced upon the courts of Scotland by the decision of the House of Lords in *Wilson v. Merry, L. R. 1 Sc. & Div. App. Cas. 326*; 19 L. T. (N. S.) 33.

For a few of the hundreds of cases upon this question, see *Wabash, etc., R. Co. v. Conkling*, 15 Ill. App. 157; *Stucke v. Orleans R. Co.* 50 La. Ann. 188, 23 So. Rep. 342; *Ackerson v. Dennison*, 117 Mass. 407; *World's Columbian Exposition v. Bell*, 76 Ill. App. 591; *Doyle v. White*, 9 App. Div. (N. Y.) 521; 41 N. Y. Supp. 628; 75 N. Y. St. Rep. 628; *Hicks v. Southern R. Co.* 63 S. C. 559; 41 S. E. Rep. 753; *Barton's Hill Coal Co. v. Ried*, 3 Macq. H. L. Cas. 266; *Baltimore, etc., R. Co. v. Colvin*, 118 Pa. St. 230; 12 Atl. Rep. 337; 20 W. N. C. 531; *Chicago, etc., R. Co. v. Ross*, 112 U. S. 377; 28 L. Ed. 787; 5 Sup. Ct. Rep. 184; *Latre mouille v. Bennington*, 63 Vt. 536; 22 Atl. Rep.

656; 48 Am. & Eng. R. Cas. 265; *Walton v. Bryn Mawr Hotel Co.*, 160 Pa. St. 3; 28 Atl. Rep. 438; *Olsen v. Nixon*, 61 N. J. L. 671; 4 Am. Neg. Rep. 515; 40 Atl. Rep. 694; *Jungnitsch v. Michigan, etc., Co.* 105 Mich. 270; 63 N. W. Rep. 296; 2 Det. Leg. N. 107; *Elwell v. Hoeker*, 86 Me. 416; 30 Atl. Rep. 84.

After a review of the early cases on this subject, Hon. Addison C. Harris said in his address before the Indiana State Bar Association, July 7, 1909 (Indiana Bar Association Report for 1909, p. 50): "So, now no matter how negligent the employer might be, yet if it appeared (1) that the accident was caused by the negligence of a fellow servant, or (2) that the servant injured contributed in the slightest degree to the accident, in none of these cases was there any right of action. And these rules were supported by the presumption (3) that the accident was caused by some fault of the servant, because generally men are not injured while carefully doing their work; and so the burden of proof was put upon him to show



servant, and the other is that he has by his contract for service impliedly assumed the risk of such association or of his fellow servant's negligence. Such being the case, it readily follows that the legislature can change the rule of public policy or provide that the implied undertaking shall not be a part of the contract for service. In the usual employers liability statutes this is done only to a limited extent, by providing in what particular instance the servant may recover for injuries occasioned by his fellow's negligence, or by providing in what particular instances the relation in law of fellow servant shall not be deemed to exist. Such statutes have been universally upheld, both by the state and Federal courts.<sup>18</sup> This power has been stated thus tersely: "It is

both the negligence of his employes and that he had not in any wise helped or contributed to the accident. And the court went further and held (4) that if the workmen knew, or in the exercise of ordinary care and observation should have known, of the negligence of the master, then he could not recover, even though in the hurry and stress of his hazardous service at the immediate time of the accident he did not recall his master's negligence."

<sup>18</sup> *McAunick v. Mississippi etc.*, R. Co. 20 Iowa, 338; *Bucklew v. Central, etc.*, R. Co. 64 Iowa, 611; *Rose v. Des Moines, etc.*, R. Co. 39 Iowa, 246; *Kansas, etc.*, R. Co. v. *Peavey*, 29 Kan. 169; *Missouri Pacific R. Co. v. Mackey*, 33 Kan. 298; 6 Pac. Rep. 291; *Attorney-General v. Railroad Cos.* 35 Wis. 425; *Dithberner v. Chicago, etc.*, R. Co. 47 Wis. 138; 2 N. W. Rep. 69; *Herrick v. Minneapolis, etc.*, R. Co. 31 Minn. 11; 16 N. W. Rep. 413 (upholding Iowa statute); *Herrick v. Minneapolis, etc.*, R. Co. 32 Minn. 435; 21 N. W. Rep. 471; *Missouri, etc.*, R. Co. v. *Mackey*, 127 U. S. 205; 32 L. Ed. 107; 8 Sup. Ct. Rep. 1161, affirming 33 Kan. 298; 6 Pac. Rep. 291; *Minneapolis, etc.*, R. Co. v. *Herrick*, 127 U. S. 210; 32 L. Ed. 109; 8 Sup. Ct. Rep. 1176,

affirming 31 Minn. 11; 16 N. W. Rep. 413; 47 Am. Rep. 771; *Pittsburg, etc.*, R. Co. v. *Montgomery*, 152 Ind. 1; 49 N. E. Rep. 482; 69 L. R. A. 875; 71 Am. St. 30; *Pittsburg, etc.*, R. Co. v. *Lightheiser*, 168 Ind. 438; 78 N. E. Rep. 1033; *Indianapolis, etc.*, R. Co. v. *Houghton*, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787; *Pittsburg, etc.*, R. Co. v. *Ross*, 169 Ind. 3; 80 N. E. Rep. 845; *Chicago, etc.*, Ry. Co. v. *Pontius*, 157 U. S. 209; 39 L. Ed. 675; 15 Sup. Ct. Rep. 585, affirming 52 Kan. 264; 34 Pac. Rep. 739; *Baltimore, etc.*, R. Co. v. *Voight*, 176 U. S. 498; 44 L. Ed. 560; 20 Sup. Ct. Rep. 385; *McGuire v. Chicago, etc.*, R. Co. 131 Iowa, 340; 108 N. W. Rep. 902; *Hancock v. Railway Co.* 124 N. C. 222; 32 S. E. Rep. 679; *Tullis v. Lake Erie, etc.*, R. Co. 175 U. S. 348; 44 L. Ed. 192; 20 Sup. Ct. Rep. 136; *Railroad Co. v. Thompson*, 54 Ga. 509; *Georgia R. Co. v. Ivey*, 73 Ga. 499; *Georgia R. Co. v. Brown*, 86 Ga. 320; *Georgia R. Co. v. Miller*, 90 Ga. 574; *St. Louis, etc.*, R. Co. v. *Matthews*, 165 U. S. 1; 41 L. Ed. 611; 17 Sup. Ct. Rep. 243; affirming 121 Mo. 298; 25 L. R. A. 161; 24 S. W. Rep. 591; *Holden v. Hardy*, 169 U. S. 366; 42 L. Ed. 780; 18 Sup. Ct. Rep. 383; affirming 14 Utah, 71; 37

competent for the legislature, in the exercise of the police power, to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others.”<sup>19</sup> In a recent case in Colorado the validity of a statute abolishing the doctrine of co-service as a defense was passed upon and the statute upheld in the following language: “The final and important question is the validity of the co-employee act. It is urged that the act is unconstitutional in that it is in conflict with the fourteenth amendment to the Federal Constitution, because it deprives persons of their property without due process of law. The act in question renders the employer liable for damages resulting from injuries to or death of an employe, caused by the negligence of a co-employe in the same manner, and to the same extent, as if the negligence causing the injury or death was that of the employer. That the act in question may be regarded by some as harsh or unjust, because imposing too great a disability, is not a matter which we can consider in determining its validity by constitutional tests. Whether or not the employer is liable under the act in question must be determined by each particular case based on the provisions of the act. It does not deprive him of any defense to the liability thereby imposed which, under the established rules of law could be regarded as sufficient, save and except his own lack of negligence; but such a defense is not a constitutional right. The law itself, as a rule of conduct, may, unless constitutional limitations forbid, be changed at the will of the legislature. The exercise of the discretion of that branch of the government to enact laws cannot be ques-

L. R. A. 103; 46 Pac. Rep. 756; 14 Utah, 96; 37 L. R. A. 108; 46 Pac. Rep. 1105; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404; 43 L. Ed. 746; 19 Sup. Ct. Rep. 419; affirming 64 Ark. 83; 37 L. R. A. 504; 62 Am. St. Rep. 154; 40 S. W. Rep. 705; Pittsburg, etc., R. Co. v. Collins, 168 Ind. 467; 80

N. E. Rep. 415; Mickelson v. Truesdale, 63 Minn. 137; 65 N. W. Rep. 260.

<sup>19</sup> Indianapolis, etc., R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787. See Tullis v. Railway Co. 175 U. S. 348; 20 Sup. Ct. Rep. 136; 44 L. Ed. 192.



tioned so long as such laws do not conflict with either state or Federal constitutional provisions. No such provisions have been called to our attention which limit the authority of the general assembly to abolish the rule heretofore existing which exempted the employer from liability to employes caused by the negligence of a co-employee, and render him liable to his employes for the negligence of a co-employee. For the purpose of providing for the safety and protection of employes in the service of a common employer, the law making power has the undoubted authority to abrogate the exception to the general rule *respondent superior* in favor of the employer, and make him liable to one of his employes for damages caused by the negligence of another employee while acting within the scope of his employment, regardless of the fact that such employes are fellow servants." 20

§ 8. **Validity of statute as to past contracts of employment.**—Where the servant has entered into the employment of a master before the statute has taken effect, but the employment is not for a continuous service—as in the case of a railroad engineer—and after the passage of the statute is in-

20 *Vindicator, etc., Co. v. Firstbrook*, 36 Colo. 498; 86 Pac. Rep. 313. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35; 31 Sup. Ct. 136; 55 L. Ed. 78; affirming 91 Miss. 273; 46 So. 360; 124 Am. St. 679; *Florida East Coast v. Lassiter*, 58 Fla. 234; 50 So. 428.

That a statute imposing liability on the master for an injury to his servant where he, the master, is not negligent, see *Ives v. South Buffalo Ry. Co.* 201 N. Y. 271; 94 N. E. 431; reversing 140 N. Y. App. Div. 921; 125 N. Y. Supp. 1125, which affirmed 68 N. Y. Misc. Rep. 643; 124 N. Y. Supp. 920.

For some Georgia cases holding under the Code that a recovery can be had for an injury caused by the negligence of a fellow servant, see *Georgia, etc., R. Co. v. Goldwire*, 56 Ga. 196; *Marsh v. South Carolina, etc., R. Co.* 56 Ga. 274; *Georgia, etc., R. Co. v. Rhodes*, 56 Ga. 645; *Georgia, etc.,*

*R. Co. v. Brown*, 86 Ga. 320; 12 S. E. Rep. 812; *Georgia, etc., R. Co. v. Cosby*, 97 Ga. 299; 22 S. E. Rep. 912; *Southern, etc., R. Co. v. Johnson*, 114 Ga. 329; 40 S. E. Rep. 235; *Georgia, etc., R. Co. v. Ivey*, 73 Ga. 499; *Georgia, etc., R. Co. v. Hicks*, 95 Ga. 301; 22 S. E. Rep. 613; *Chandler v. Southern R. Co.* 113 Ga. 130; 38 S. E. Rep. 305.

For a recent case on this question, see *Kiley v. Chicago, etc., R. Co.* 138 Wis. 215; 119 N. W. Rep. 309; 120 N. W. 756, and *Haring v. Great Northern Ry. Co.* (Wis.), 119 N. W. Rep. 325.

These last two cases hold that the excepting of office and shop employes of a railroad from the operation of the act does not render it invalid. See *Callahan v. Bridge Co.*, 170 Mo. 473; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746; *Howard v. Illinois Central Ry. Co.* 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. Ed. 297.

jured by a fellow servant, and he would not have had a right of recovery except for its provisions, he may recover his damages, and such legislation is not retroactive nor does it impair the obligation of a contract.<sup>21</sup> This question came before the Circuit Court for the Northern District of Iowa upon a construction of the act of June 11, 1906,<sup>22</sup> but the court held that the statute in its terms was not retroactive. The question then before the court was whether the act of Congress had taken away a right of action given by an Iowa statute, the cause of action having arisen in 1905; and the court held that the act of 1906 had no retroactive effect, and if it did so have as to take away the cause of action, it would be void.<sup>23</sup>

**§ 9. Limiting statute to employes of railroad companies—Fourteenth Amendment.**—A statute concerning liability of a master to his servant for injuries occasioned by his fellow is not special legislation, nor is it the taking of property without due process of law. “The company calls attention of the court,” said Justice Field of the Supreme Court of the United States, “to the rule of law exempting from liability an employer for injuries to employes caused by the negligence or incompetency of a fellow servant which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow servants in the same common employment, and acting under the same immediate action \* \* \*

Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention

<sup>21</sup> *Pittsburg, etc., R. Co. v. Lighthouse*, 168 Ind. 438; 78 N. E. Rep. 1033; *Pittsburg, etc., R. Co. v. Lighthouse*, 163 Ind. 247; 71 N. E. Rep. 218, 660.

<sup>22</sup> C. 3073, 34 statute at L. 232.

<sup>23</sup> *Hall v. Chicago, etc., R. Co.* 149 Fed. Rep. 564.

of the company \* \* \* is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes, in such cases, the taking of property without due process of law, in violation of the fourteenth amendment. \* \* \* The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist where the company, without any wrong or negligence on its part, is charged for injustice to passengers. \* \* \* The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a liability upon railroad companies, where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we can have no doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the law is even less tenable than the one considered. It seems to act upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and the laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. \* \* \* A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and main-

tain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect of both the privileges conferred and the liabilities imposed. \* \* \* But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public."<sup>24</sup> In a subsequent case a like decision was made, where a statute applied only to railroads.<sup>25</sup>

<sup>24</sup> *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107; affirming 33 Kan. 298; 6 Pac. Rep. 291; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210; 8 Sup. Ct. Rep. 1176; 32 L. Ed. 109, and affirming *Herrick v. Minneapolis, etc., R. Co.* 31 Minn. 11; 16 N. W. Rep. 413; 47 Am. Rep. 771; *Herrick v. Minneapolis, etc., Co.* 32 Minn. 435; 21 N. W. Rep. 471; *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1; 49 N. E. Rep. 482; 69 L. R. A. 875; 71 Am. St. Rep. 30; *Indianapolis Union Ry. Co. v. Houlihan*, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787.

<sup>25</sup> *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. Ed. 666; reversing 87 Tex. 19; 26 S. W. Rep. 985, *Alummun Co. v. Ramsey* 32 Sup. Ct., 76.

*Deppe v. Chicago, etc., R. Co.* 36 Iowa, 52; *Schroeder v. Chicago, etc., R. Co.* 47 Iowa, 375; *Potter v. Chicago, etc., R. Co.* 46 Iowa, 399; *O'Brien v. Chicago, etc., R. Co.* 116

Fed. Rep. 502; *Chicago, etc., R. Co. v. Pontius*, 52 Kan. 264; 34 Pac. Rep. 739; affirmed, 157 U. S. 209; 15 Sup. Ct. Rep. 585; 39 L. Ed. 675; *Lavallee v. St. Paul, etc., R. Co.* 40 Minn. 249; 41 N. W. Rep. 974; *Johnson v. St. Paul, etc., R. Co.* 43 Minn. 222; 45 N. W. Rep. 156; 8 L. R. A. 419; *Hancock v. Norfolk, etc., R. Co.* 124 N. C. 222; 32 S. E. Rep. 679; *Indianapolis, etc., R. Co. v. Houlihan*, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787; *Dithberner v. Chicago, etc., R. Co.*, 47 Wis. 138.

There has been much discussion whether or not the prohibition in the Fourteenth Amendment prohibiting states enacting laws giving unequal protection to citizens is the same in meaning with reference to such states as the prohibition in the Fifth Amendment is with reference to the power of Congress. The question has never been decided. See *Stratton v. Morris*, 89 Tenn. 497.



§ 10. **Validity of statute classifying instrumentalities.**—Not only may the legislature select railway companies for legislation concerning their employes, but it may specify in what particulars they shall be liable, as, for instance, concerning “any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway.” “These,” said the Supreme Court of Indiana, “were proper to be selected as sources of unusual danger which should be guarded against; the object to be accomplished was to incite railroad companies to use the utmost diligence in the selection and supervision of their servants who are put in charge of these dangerous agencies, so that fewer lives and limbs of those who are entitled to claim the protection of our laws would be sacrificed; the legislature evidently considered that strangers and employes (the attorney and the ticket seller, for example) who were not fellow servants of those in charge of the agencies named were sufficiently protected by the railroad company’s existing liability to them for the negligent operation of those dangerous agencies; the legislature evidently determined to protect all persons who were not already protected for the negligent use of particular instruments; this classification is made on the basis of the peculiar hazards in railroading, relating equally to all employers within the class; to separate railroading from other business was not an unconstitutional discrimination, because the dangers (the basis of the classifications) do not arise from the same sources; but the claim that a classification not made on the basis of dangerous agencies employed in the business, but founded on the question whether the employe who was injured without his fault by a fellow servant’s negligent use of a dangerous agency was acting at the time on his own initiative in the line of his duty or under the orders of a superior, is the only constitutional classification, is unwarranted: a train is wrecked through the negligence of the engineer, two brakemen are injured without fault on their part, one acting at the time in obedience to the con-

ductor's orders, the other acting on his own initiative within the line of his duty; there should be and there is no constitutional limitation upon the legislature's exercise of the police power by which a law may not be enacted to protect both brakemen equally from the negligence of the engineer. We hold, therefore, that the act is not obnoxious to the objections urged by appellants." <sup>26</sup>

**§ 11. Power of Congress to enact statute of 1908.**—The Employers Liability Act of 1906 was stricken down because congress had attempted to legislate upon a subject or subject-matter that related wholly to the power of a state; and had so attempted to interblend that power with its power to legislate upon the subject of interstate commerce that the several clauses could not be separated and those clauses relating alone to interstate commerce remain. It was upon this ground alone that this statute of 1906 was overthrown.

<sup>26</sup> Indianapolis Union Ry. Co. v. Houlihan, 157 Ind. 494; 60 N. E. Rep. 943; 54 L. R. A. 787.

That a classification cannot be made arbitrarily, see Gulf, etc., R. Co. v. Ellis, 165 U. S. 150; 17 Sup. Ct. Rep. 255; 41 L. Ed. 666; State v. Loomis, 115 Mo. 807; Missouri Pacific R. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404; 19 Sup. Ct. Rep. 419; 43 L. Ed. 746; Connolly v. Union Sewer Pipe Co. 184 U. S. 540; 22 Sup. Ct. Rep. 431; 46 L. Ed. 679; Akeson v. R. Co. 106 Iowa, 54; 75 N. W. Rep. 676; Lavalley v. St. Paul, etc., R. Co. 40 Minn. 249; 41 N. W. Rep. 947; Johnson v. St. Paul, etc., R. Co. 43 Minn. 222; 45 N. W. 156; Missouri, etc., R. Co. v. Medaris, 60 Kan. 151; 55 Pac. Rep. 875; Indianapolis T. & T. Co. v. Kinney, 171

Ind. 612; 85 N. E. Rep. 954; Tullis v. Lake Erie, etc., R. Co. 175 U. S. 349; 20 Sup. Ct. Rep. 136; 44 L. Ed. 192; 105 Fed. Rep. 554; Minnesota Iron Co. v. Kline, 199 U. S. 593; 26 Sup. Ct. Rep. 159; 50 L. Ed. 322; Chicago, etc., R. Co. v. Pontius, 157 U. S. 209; 15 Sup. Ct. Rep. 585; 39 L. Ed. 675; affirming 52 Kan. 264; 34 Pac. Rep. 739. An employee is as much an instrument in the forwarding of interstate commerce as a car loaded with interstate traffic; and Congress has as much power to legislate with reference to him as to the car. It certainly is a confession of the great weakness of the government when it is claimed that the United States can legislate concerning a car engaged in interstate commerce but is powerless to legislate for the protection of an employee handling that car.



But the court was very careful to point out that congress had the power to enact a statute relating to employers and employes engaged in interstate commerce, where the statute was enacted for the protection of the employe. In discussing the act of 1906, and meeting the assertion that there was a total want of power in congress in any conceivable aspect to regulate the subject with which the act dealt, and also stating that "if it be that from the nature of the subject no power whatever over the same can, under any conceivable circumstances, be possessed by congress, we ought to so declare," the Supreme Court, through Justice White, said:

"1. The proposition that there is an absolute want of power in congress to enact the statute is based on the assumption that as the statute is solely addressed to the regulation of the relations of the employer to those whom he employs and the relation of those employed by him among themselves, it deals with subjects which cannot under any circumstances come within the power conferred upon congress to regulate commerce.

As it is patent that the act does regulate the relation of master and servant in the cases to which it applies, it must follow that the act is beyond the authority of congress if the proposition just stated be well founded. But we may not test the power of congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates, irrespective of whether the regulation in question is one of interstate commerce. On the contrary, the test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. We think of the unsoundness of the contention, that because the act regulates the relation of master and servant, it is unconstitutional, because under no circumstances and to no extent can the regulation of such subject be within the grant of author-

ity to regulate commerce, is demonstrable. We say this because we fail to perceive any just reason for holding that congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by congress on that subject are solely confined to interstate commerce, and, therefore, are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or, at all events, to recognize the power and yet to render it incomplete. Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we think the error of the proposition is shown by previous decisions of this court. Thus, the want of power in a state to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question.<sup>27</sup> And decisions cited in the margin,<sup>28</sup> holding that state statutes which regu-

<sup>27</sup> Mississippi R. R. Co. v. Illinois Cent. R. R., 203 U. S. 335, 343; 27 Sup. Ct. Rep. 90; 51 L. Ed. 209; affirming 70 C. C. A. 617; 138 Fed. Rep. 377, and cases cited; Atlantic Coast Line R. R. v. Wharton et al. Railroad

Commissioners, 207 U. S. 328; 28 Sup. Ct. Rep. 121; 52 L. Ed. 230.

<sup>28</sup> Sherlock v. Alling, 93 U. S. 99; 23 L. Ed. 819; affirming 44 Ind. 184; Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107;

late the relation of master and servant were applicable to those actually engaged in an operation of interstate commerce, because the state power existed until congress acted, by necessary implication, refute the contention that a regulation of the subject, confined to interstate commerce, when adopted by congress would be necessarily void because the regulation of the relation of master and servant was, however, intimately connected with interstate commerce, beyond the power of congress. And a like conclusion also persuasively results from previous rulings of this court concerning the act of congress, known as the Safety Appliance Act."<sup>29</sup>

affirming 33 Kan. 298; 6 Pac. Rep. 291; Minneapolis, etc., Ry. Co. v. Herrick, 127 U. S. 210; 8 Sup. Ct. Rep. 1176; 32 L. Ed. 109; affirming 31 Minn. 11; 16 N. W. Rep. 413; 47 Am. Rep. 771; Chicago, etc., Ry. Co. v. Pontius, 157 U. S. 209; 155 Sup. Ct. Rep. 58; 39 L. Ed. 675; affirming 52 Kan. 264; 34 Pac. Rep. 739; Tullis v. Lake Erie & W. R. R. 175 U. S. 348; 20 Sup. Ct. Rep. 136; 44 L. Ed. 192.

<sup>29</sup> Employers' Liability Cases, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297; decided January 6, 1908, and citing Johnson v. Southern Pacific Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363, reversing 54 C. C. A. 508; 117 Fed. Rep. 462; Schlemmer v. Buffalo, Rochester, etc., Ry. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 68, reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

The question of the constitutionality of this statute has been practically foreclosed in this language used in a subsequent case: "In this case [the Employers' Liability case] the court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by em-

ployees while actually engaged in such commerce." *Adair v. United States*, 208 U. S. 161, 178; 28 Sup. Ct. Rep. 277; 52 L. Ed. 436, reversing 152 Fed. Rep. 737.

The act is constitutional. *Mon- don c. New York, N. H. & R. R. Co.*, 32 Sup. Ct. 32; *St. Louis, I. M. & S. Ry. Co. v. Conley*, 187 Fed. 949; *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 494; *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942; *Zikos v. Oregon R. & N. Co.* 179 Fed. 893; *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87; 30 Sup. Ct. 21; 54 L. Ed. 106; 37 Wash. L. Rep. 782; affirming 117 S. W. 436, which reversed (Tex. Civ. App.), 117 S. W. 159, and approved *Hyde v. Southern Ry. Co.*, 31 App. D. C. 466.

Section three has been held valid. *McNamara v. Washington Terminal Co.*, 35 App. D. C. 230; *Potter v. Baltimore & O. R. Co.* 37 Wash. Law Rep. 466 [See also *McGuire v. Chicago, B. & O. Ry. Co.* 131 Iowa, 340; 108 N. W. 902, on the validity of a state statute.] In one case it was decided that Congress has authority to prescribe rules of liability as between an interstate carrier and its employees in interstate commerce in case of injury to the employee while actually engaged in such commerce;

§ 12. **Constitutionality of Wisconsin and Nebraska Statutes.**—The statute of Wisconsin allowing a recovery where the plaintiff has contributed to his injuries by his negligence, but apportioning the damages according to his negligence which contributed to the injury, has been held constitutional. It is not void because it applies only to railroads; nor is it void because it exempts office and shop employees from its provisions.<sup>29\*</sup> So the Nebraska statute has been held valid.<sup>29†</sup>

that the Act of June 22, 1908, does not attempt to delegate judicial power of the United States to state courts, in violation of Article 3 of the Constitution, but creates substantive rights not solely cognizable in the Federal courts, but which may be availed of in any court of competent jurisdiction, state or Federal; that the Act is not invalid because it results in establishing rules and measures of liability in cases to which it applies, different from those which exist under the state laws in other cases arising from the relation of master and servant, nor because it gives a right of recovery in case of the death of an employee to different parties; that whether or not the Act is effective to carry out the purpose intended, and thus promote interstate commerce, is a legislative and not a judicial question, which cannot affect the constitutional power of Congress to enact it; and that the Act is not unconstitutional as denying the equal protection of the laws to the carriers affected thereby. If section 5 was invalid, it was held that its invalidity would not affect the remainder of the Act. *Zikos v. Oregon R. & N. Co.* 179 Fed. 893.

In the case of *Hoxie v. New York, N. H. & H. R. Co.* 82 Conn. 352; 73 Atl. 754, almost every line of the Act was held to be unconstitutional. That was a suit brought in a state court to recover damages. The Supreme Court held

that a state court had no jurisdiction of such an action—one brought under the statute—and then in its eagerness to strike down the Act, violated a practically universal practice—never to pass upon the constitutionality of a statute unless necessary to a disposal of the case, especially so if the court had no jurisdiction of the action brought—and held the entire Act unconstitutional. The prejudice of the writer of that opinion against Federal legislation is manifest throughout the opinion. Because of this opinion Congress, in 1910, amended the Act expressly giving state courts jurisdiction. See also *Mondon v. New York, etc., R. Co.* 82 Conn. 373; 73 Atl. 762; reversed 32 Sup. Ct. 169

<sup>29\*</sup> *Kiley v. Chicago, M. & St. P. Ry. Co.* 145 Wis. 326; 128 N. W. 982; *Kiley v. Chicago, M. & St. P. Ry. Co.* 138 Wis. 215; 119 N. W. 309; 120 N. W. 756; *Ladd v. Minneapolis, St. P. & S. S. M. Ry. Co.* 142 Wis. 165; 125 N. W. 468.

<sup>29†</sup> *Swoboda v. Union Pacific R. Co.* 87 Neb. 200; 127 N. W. 215; *Missouri Pacific Ry. Co. v. Castle*, 172 Fed. 841. This Nebraska statute covers the case of a railway company's servant employed in the water supply department and engaged in drilling a well to be used in supplying its locomotives with water. *Metz v. Chicago, B. & Q. R. Co.* 88 Neb. 459; 129 N. W. 994.



§ 13. **Invalidity of Act of 1906.**—The ground of the decision <sup>50</sup> of the Supreme Court was that matters pertaining to the state and those pertaining to the Federal Government

The validity of the Act of 1906 had been before the lower courts, and in four cases had been held constitutional. The reasoning of these cases upholds the claim that Congress has the power to enact a statute on the subject; and upon that question may be considered authoritative, though, as applied to the ground upon which that act was held invalid, they cannot be so considered. They are *Spain v. St. Louis, etc.*, R. Co. 151 Fed. Rep. 522, from the Eastern District of Arkansas, decided March 13, 1907; *Snead v. Central Georgia Ry. Co.* 151 Fed. Rep. 608, from the Southern District of Georgia, decided March 25, 1907; *Plummer v. Northern Pacific Ry. Co.* 152 Fed. Rep. 206, from the Western District of Washington, decided March 2, 1907, and *Kelley v. Great Northern Railway Co.* 152 Fed. Rep. 211, from the District of Minnesota, decided March 11, 1907. None of these cases make any reference to any of the others.

On the other hand, December 31, 1906, the Circuit Court for the Western District of Kentucky held the statute of 1906 void, both on the ground that Congress had no power to legislate upon the subject-matter as it related to interstate commerce, and also that it was void upon the ground the Supreme Court later held it invalid. *Brooks v. Southern Pac. Co.* 148 Fed. Rep. 986. A similar decision was rendered in the Circuit Court for the Western District of Ten-

nessee. *Howard v. Illinois Central R. Co.* 148 Fed. Rep. 997, decided January 1, 1907. These were the two cases appealed from and affirmed as the *Employer's Liability Cases*.

For cases upholding the validity of the Safety Appliance statute. See *Johnson v. Railroad*, 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; affirming 117 Fed. Rep. 462; and *Schlemmer v. Railroad*, 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 88; reversing 207 Pa. St. 198; 56 Atl. Rep. 417. See also *Chicago, etc., R. Co. v. Voelker*, 129 Fed. Rep. 526; S. C. 116 Fed. Rep. 867.

See also speech of Congressman Henry of Texas, 60 Cong. Record, 1st Sess., p. 4427. See pp. 4428, 4429, 4430 and 4431 for report of minority holding the proposed act of 1908 unconstitutional, and pp. 4428, 4431, 4432, 4433 for speech of Congressman Littlefield of Maine, holding the bill unconstitutional. See also pp. 4434, 4435 and 4436 (inserted in this work as Appendix B) of same volume, holding bill valid. For dissenting views from the majority report in favor of the bill of Congressman Parker of New Jersey, see pp. 4437 and 4438 of same volume.

<sup>50</sup> *Employers' Liability Cases*, 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. Ed. 297, affirming *Brooks v. Southern Pac. Co.* 148 Fed. Rep. 986, and *Howard v. Illinois Central Ry. Co.* 148 Fed. Rep. 997.

were so blended that they could not be separated by the court, and, therefore, the whole act must be held void.<sup>31</sup>

**§ 14. The parts of the Act of 1906 rendering it invalid.**—In analyzing the statute of 1906 and pointing out the clauses which rendered it invalid, and why it must be considered invalid, Justice White called particular attention to the fact that the act did not confine itself to the business of interstate commerce, but sought to embrace all who engaged in interstate commerce as common carriers, regardless of the fact that the servant injured may have had nothing whatever to do with interstate commerce or the carrier when he was injured, may not have been working in connection with the business of interstate commerce. In presenting this phase of the case, he said: "From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the Dis-

<sup>31</sup> Chief Justice Fuller and Justices White, Day, Peckham and Brewer adopted this view. Justices Moody, Harlan, McKenna and Holmes hold that the invalid portions can be separated by interpretation, and as so separated it is valid. Justices White and Day held that Congress had the power to enact a valid statute upon the subject, while Justices Brewer, Peckham and Chief Justice Fuller declared they were not

prepared to agree with what was stated in the opinion delivered by Justice White. In that determination Justices Harlan, McKenna, Moody and Holmes agreed. It will thus appear that six out of the nine judges concurred in the assumption that Congress could enact a valid statute concerning the liability of employers of an interstate carrier for injuries occasioned in interstate business.



trict of Columbia, or in any territory of the United States, or between the several states,' etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the states, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do; that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce. And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates. Thus, the liability of a common carrier is declared to be in favor of 'any of its employes.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employes of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from 'the negligence of any of its officers, agents or employes.' The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their

employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and it may be for construction work as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business and yet as to the remainder crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.”<sup>32</sup>

**§ 15. Congress can only legislate concerning interstate business.**—In the case in the Supreme Court, an endeavor was made to uphold the Act of 1906 on the ground that “any one who engages in interstate commerce thereby sub-

<sup>32</sup> Employers' Liability Cases, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297.

The Act of 1906 was valid as to the territories. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87; 30 Sup. Ct. 21; 54 L. Ed. 106, affirming 102 Tex. 378; 117 S. W. 426; *Atchison, T. & S. F. Ry. Co. v. Mills* (Tex. Civ. App.), 108 S. W. 480.

And as to the District of Columbia: *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123; *McNamara v. Washington Terminal Co.* 35 App. D. C. 230; *Hyde v. Southern Ry. Co.* 31 App. D. C. 466; 36 Wash. L. Rep. 374; *Goldstein v. Baltimore & O. R. Co.* 37 Wash. L. Rep. 2.

mits all his business concerns to the regulating of congress.” To this claim the court said: “To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was the purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as congress may prescribe, even although the conditions would be otherwise beyond the power of congress. It is apparent that if the contention were well founded it would extend the power of congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.”<sup>33</sup>

**§ 16. Effect of Act of 1908 on State Legislation.**—A question of great importance is, “What is the effect of the Act of 1908 upon state legislation, where the business of interstate commerce is involved?” Before the passage of either the Act of 1906 or that of 1908, many states had enacted statutes which applied in terms to carriers engaged in interstate commerce, and even to carriers when engaged in the business of interstate commerce; recoveries had been allowed by employes in many instances where they received their injuries while engaged in such business. As congress had not yet legislated upon the subject, fewer difficulties were presented than there are now. The legislation of 1908 is so much broader in many of its most vital provisions that

<sup>33</sup> Employers' Liability Cases,  
207 U. S. 463; 28 Sup. Ct. Rep.  
143; 52 L. Ed. 297.

few occasions will probably present themselves; nevertheless, the question is an important one. This question under the Act of 1906 was discussed but not decided.<sup>34</sup> No question seriously arises where a state statute and the Act of 1908 cover the same incident or injury: that the latter will control and the former must give way.<sup>35</sup> There is a line of cases which hold that where a state statute amounts to the regulation of interstate commerce, yet local in its character, it can be sustained by reason of the absence of congressional legislation in respect thereto.<sup>36</sup> In one case, speaking of quarantine regulations, the Supreme Court of the United States has said: "It may be conceded that whenever congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent."<sup>37</sup> In another case it was said: "Generally, it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other

<sup>34</sup> Hall v. Chicago, etc., Ry. Co. 149 Fed. Rep. 564.

<sup>35</sup> Gulf, etc., Ry. Co. v. Hefley, 158 U. S. 98; 15 Sup. Ct. Rep. 802; 39 L. Ed. 910.

<sup>36</sup> Such are Railroad Co. v. Fuller, 17 Wall. 560; 21 L. Ed. 710; Wilson v. Blackbird, etc., Co. 2 Pet. 245; 7 L. Ed. 412; Cooley v. Philadelphia Port Wardens, 12 How. 299; 13 L. Ed. 996; Pennsylvania v. Wheeling, etc., Bridge, 18 How. 421; 15 L. Ed. 435; Brig James Gray v. Ship John Fraser, 21 How. 184; 16 L. Ed. 106; Gilman v. Philadelphia, 3 Wall. 713; 18 L. Ed. 96; *Ex*

*parte* McNiel, 13 Wall. 236; 20 L. Ed. 624; Mobile County v. Kimball, 102 U. S. 691; 26 L. Ed. 238, affirming 3 Woods, 555; Fed. Cas. No. 7,774; Packet Co. v. Cattlesburg, 105 U. S. 559; 26 L. Ed. 1; Transportation Co. v. Parkersburg, 107 U. S. 691; 2 Sup. Ct. Rep. 732; 27 L. Ed. 584; Escanaba Co. v. Chicago, 107 U. S. 678; Morgan v. Louisiana, 118 U. S. 455; 6 Sup. Ct. Rep. 1114; 30 L. Ed. 237; affirming 36 La. Ann. 666.

<sup>37</sup> Morgan v. Louisiana, *supra*, quoted in Gulf, etc., R. Co. v. Hefley, *supra*.



reserved powers of the states, is subordinate to those terms conferred by the Constitution upon the nation.”<sup>38</sup> In an earlier case it was said: “It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of congress or treaty of the United States. Such a proposition is supported in the passenger cases,<sup>39</sup> by the decisions of this court in *Cooley v. The Board of Wardens*,<sup>40</sup> and by the cases of *Crandall v. Nevada*,<sup>41</sup> and by *Gilmer v. Philadelphia*.<sup>42</sup> But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and, in the case of *Cooley v. The Board of Wardens*,<sup>43</sup> it was said, that ‘whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.’ A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character.”<sup>44</sup>

**§ 17. Effect of Act of 1908 on State Legislation, continued.**—The cases from which these quotations are made do not necessarily settle the question; for the subject of interstate commerce under the decisions has greatly expanded in the last twenty years. Many of the cases discussing the subject have resulted in distinctions being drawn concerning what are and what are not acts of interstate commerce; and,

<sup>38</sup> *Gulf, etc., Ry. Co. v. Hefley*,  
*supra*.

<sup>39</sup> 7 How. 283.

<sup>40</sup> 12 How. 299.

<sup>41</sup> 6 Wall. 35.

<sup>42</sup> 3 Wall. 713.

<sup>43</sup> *Supra*.

<sup>44</sup> *Henderson v. Mayor*, 92 U. S. 259; 23 L. Ed. 543.



of course, in all instances where the Supreme Court of the United States reached the conclusion that a state statute did not interfere with or was not a regulation of commerce between the states, no further question was presented of the power of a state to legislate upon questions of interstate commerce. In 1886 was decided a case of far-reaching consequences, and which called forth legislation by Congress upon the subject of interstate commerce. A statute of Illinois undertook to regulate shipments over railroads where they were made both solely within the state as well as beyond its borders; and the court held so much of it as related to shipments beyond the state lines was void, because it was legislation upon a subject the regulation of which had been confided solely to Congress. This was a decision rendered before Congress had legislated upon the subject-matter of the Illinois statute.<sup>45</sup> Eight years later the doctrine of this case was applied to a bridge between two states, holding that one of the states could not regulate the tolls for passengers over it, for the reason that only Congress could regulate them.<sup>46</sup> But in considering this subject, it must not be overlooked that the interstate commerce law of the Constitution does not prohibit a state exercising its police power for the

<sup>45</sup> *Wabash R. Co. v. Illinois*, 118 U. S. 557; 7 Sup. Ct. Rep. 4; 30 L. Ed. 244; reversing 105 Ill. 236.

<sup>46</sup> *Covington, etc., Co. v. Kentucky*, 154 U. S. 204; 14 Sup. Ct. Rep. 1087; 38 L. Ed. 962; reversing 15 K. L. Rep. 320; 22 S. W. Rep. 851.

A state cannot discriminate against liquors being imported into it so long as it recognizes their sale, manufacture and use. *Scott v. Donald*, 165 U. S. 58; 17 Sup. Ct. Rep. 262; 41 L. Ed. 648; *Vance v. Vandercook*, 170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. Ed. 1100.

Of course, a state cannot levy

a tax upon the instrumentalities of interstate commerce, even in the absence of congressional legislation. *State Freight Tax Cases*, 15 Wall. 232; 21 L. Ed. 146; reversing 62 Pa. St. 286; 1 Am. Rep. 399; *Robbins v. Shelby Taxing District*, 120 U. S. 489; 7 Sup. Ct. Rep. 592; 30 L. Ed. 694, reversing 13 Lea 303; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; 7 Sup. Ct. Rep. 1126; 30 L. Ed. 1187; reversing 95 Ind. 12; 48 Am. Rep. 692; *Telegraph Co. v. Texas*, 105 U. S. 460; *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1; 24 L. Ed. 708; affirming 2 Woods, 643; Fed. Cas. No. 10,960.

safety and health of its own inhabitants. Thus, a statute concerning color-blindness of railroad engineers is valid, although they may be engaged in running locomotives hauling trains from one state to another, on the ground that it was the plain duty for a state to make provisions for the safety of its inhabitants.<sup>47</sup> So statutes respecting crossings of railroads and highways of railway companies engaged in interstate commerce are valid; so are statutes regulating the speed of trains within municipalities.<sup>48</sup> So are statutes requiring guard posts on railroad trestles and bridges.<sup>49</sup> But notwithstanding these decisions, it is an accepted rule that in all instances where freedom of commerce between the states is directly involved, the failure of Congress to enact a statute fitting a particular instance is to be taken as an indication of the will of that body that such commerce should remain free and untrammelled; and in such instances attempted state legislation on such particular instances is void. Yet notwithstanding this general rule, where Congress enacted a law making it unlawful to transport known diseased cattle from one state to another, a state statute imposing a civil liability upon a railway company which brought diseased cattle into the state, and another statute that made it a finable offense to bring into the state cattle which, within ninety days before their importation, had herded with stock having a contagious disease, were held valid; for the state had not assumed charge of their transportation but was aiming to protect its own people and their property against the danger of contact with diseased stock. But it was said in substance that if the entire subject of transportation of diseased stock

<sup>47</sup> *Smith v. Alabama*, 124 U. S. 465; 8 Sup. Ct. Rep. 564; 31 L. Ed. 508, affirming 76 Ala. 69; *Nashville, etc., R. Co. v. Alabama*, 128 U. S. 96; 9 Sup. Ct. Rep. 28; 32 L. Ed. 352; affirming 83 Ala. 71; 3 So. Rep. 702.

<sup>48</sup> *Erb v. Morasch*, 177 U. S.

584; 20 Sup. Ct. Rep. 819; 44 L. Ed. 897; affirming 60 Kan. 251; 56 Pac. Rep. 133.

<sup>49</sup> *New York, etc., R. Co. v. New York*, 165 U. S. 628; 17 Sup. Ct. Rep. 418; 41 L. Ed. 853; affirming 142 N. Y. 646; 37 N. E. Rep. 568.

from one state to another had been taken over by Congress and a system devised by which such stock could be excluded or their transportation so regulated as not to endanger the inhabitants or property of the receiving state, all local regulations would cease and remain suspended until the Federal statute was repealed and the Federal control abandoned.<sup>50</sup>

**§ 18. Result of decisions.**—If it be construed that the Federal Employers' Liability Act covers every instance of any person suffering an injury while he is employed "in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation," then all state regulations—at least those changing or modifying the common law liability—are void, because Congress has manifested a desire and has covered the whole subject so far as giving a statutory action is concerned. The entire question resolves itself into a matter of construction. A careful reading of the statute would seem to indicate that Congress had covered the entire subject of liability of an interstate railroad company for negligence to its employe engaged in interstate commerce; and that is the consensus of opinion of those who have carefully examined the statute.<sup>51</sup>

<sup>50</sup> Missouri, etc., Ry. Co. v. Haber, 169 U. S. 613; 18 Sup. Ct. Rep. 488; 42 L. Ed. 878; affirming 56 Kan. 694; 44 Pac. Rep. 632; Reid v. Colorado, 187 U. S. 137; 23 Sup. Ct. Rep. 92; 47 L. Ed. 108; Rasmussen v. Idaho, 181 U. S. 198; 21 Sup. Ct. Rep. 594; 45 L. Ed. 820; affirming 7 Idaho, 1; 52 L. R. A. 78; 97 Am. St. Rep. 234; 59 Pac. Rep. 933.

Any attempt to classify the questions by the adoption of a rule that a majority of the freight carried on the train must be interstate freight or a majority of the

passengers on the train must be interstate passengers before it can be said that the train is an interstate train or those employees in charge of it are employed in interstate commerce, must impress any one as an impracticable rule and one that nullifies the act in its practical workings. If such a rule were adopted the act would scarcely be worth the paper on which it is written; and besides, no reason can be assigned why such a rule should be adopted.

<sup>51</sup> It is clear, from the debates, that many of the Senators

**§ 19. Must interstate employee bring his action on the statute.**—If the act of Congress is exclusive, must an employee engaged in interstate commerce, when injured, bring his action upon the statute? This is a very important

entertained the notion that the act would nullify all state legislation upon the same subject so far as it related to employees engaged in interstate commerce. In discussing the subject, Senator Bacon said: "My proposition is this—and as a proposition of law I do not think I can possibly be mistaken in it—that whenever the Congress of the United States has jurisdiction to enact a law for the regulation of interstate commerce, it necessarily nullifies the law of a state passed upon the same subject, and that when you pass this law no law of any state prescribing the rules of liability for an employee engaged in interstate commerce is any longer of any force or effect. That is necessarily so, and whether it can be enforced in a state court or in a federal court, the law thereafter must be this law and no other law. The day it is passed every state law which prescribes a rule of liability for an employee engaged in interstate commerce is annulled, and it is the same as if it had been the repeal of the law of the state."

Senator Beveridge: "Our power is exclusive when we act."

Senator Bacon: "Absolutely so. There is no doubt about that in the world. It is only a question of jurisdiction to act."

Senator Beveridge: "Certainly."

Senator Bacon: "If we have the jurisdiction to act, and do act,

the federal law is supreme, and it nullifies every state law on the subject."

Senator Clay: "My idea was that when the bill should become a law all laws in the state fixing the rule of liability of common carriers engaged in interstate commerce would be superseded by virtue of this law, and whenever an employee proceeds against a railway company for injuries suffered, he must look to this statute to fix the rule of liability, and not to the statute of the state."

Senator Borah: "If a party is engaged at the time of his injury in interstate commerce, his rights and obligations must undoubtedly be settled by the law which we shall pass. If he should be engaged in state commerce or interstate commerce, the state law would obtain. In other words, this proposed law would only annul the state law in so far as it affects interstate commerce."

Senator Clay: "I think the Senator is eminently correct. The statute of Georgia, fixing a liability against railroad companies in favor of employees relating to commerce within the state would not be changed by the passage of this statute. It would simply affect the employees engaged at the time of the accident in interstate commerce. I do not think there is any question about that." 60 Cong. Record, 1st Sess., pp. 4528, 4529.



question, and it has been answered. Since the act of Congress repeals or suspends state legislation within the scope of its provisions such an employee must bring his action upon the statute, and if he does not he will be defeated.<sup>51\*</sup> It is now settled by several cases that the statute "was intended by Congress to cover the entire subject-matter of the liability of carriers by railroad while engaged in interstate commerce to employees if the employee injured or killed is at the time engaged in such interstate commerce, and that it is plenary and supersedes all other law relating to such liability;" and the court added: "Consequently this action, founded on a State statute, can not now be maintained." The action had been brought on a state statute, but the railway company insisted that, as the deceased was a locomotive engineer engaged at the time of his injury in moving interstate traffic, it should have been brought upon the Federal statutes; and the court upheld its contention.<sup>51a</sup> In another case it was said: "It is clear that the [Federal] Act of April 22, 1908, superseded and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk,

<sup>51\*</sup> If the pleading does not show that the plaintiff was engaged in interstate commerce, but the evidence develops the fact that he was, then there would be a fatal variance that would defeat him unless the complaint or declaration was amended. The defendant could file an answer or plea setting up the fact that he was so engaged which would present an issue for the jury; and if proven the verdict must be for the defendant.

So if there was a declaration upon the statute, but the evidence

showed that the plaintiff was not engaged in interstate commerce when injured, the verdict must be for the defendant; and no answer or plea to that effect is necessary.

<sup>51a</sup> *Dewberry v. Southern Ry. Co.* 175 Fed. 307. This view has been held in the following cases: *Taylor v. Southern Ry. Co.* 178 Fed. 380; *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 318; *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893; *Fithian v. St. Louis & S. F. Ry. Co.* 188 Fed. 842; *The Passaic*, 190 Fed. 644.



making in certain cases, at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive. All state legislation on that subject must give away before that act."<sup>51b</sup> Nor can a state or territorial statute be resorted to in order to defeat the cause of action given by the Federal statute.<sup>51c</sup> After quoting section two of the Federal Act, it was said in one case: "Here, then, is an act of Congress, enacted for the purpose of enabling employes of common carriers by railroad to recover damages for injuries suffered by them while employed by the common carriers in the territories. The section of the act quoted has specific application to the territories, and, being the supreme law of the land, supersedes all other laws embracing the same subject-matter." The court then makes a short analysis of the statute, and adds: "When the act is analyzed, it becomes apparent that it was the purpose of Congress to confer rights and benefits upon the injured employee which were denied him by the common law, and hence the existence of a common law right of action on the part of an injured employee cannot, in reason, be claimed in the presence of this act of Congress. Indeed, the act is the law, and the only law<sup>51d</sup> under which suits like the present one may be brought. It is the law

<sup>51b</sup> *Fulgham v. Midland R. Co.* 167 Fed. 660. It was held that in this case, the action having been brought upon the Federal statute, resort could not be had to the Arkansas statute to enable the administrators of an interstate commerce employee to enforce the employee's right of action, it having died with him, because the Federal statute gave no right of action to his personal representatives. *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 494.

<sup>51c</sup> *Southern Pacific Co. v. McGinnis*, 174 Fed. 649; *El Paso & N. E. Ry. Co. v. Gutierrez*, 215 U. S. 87; 30 Sup. Ct. 21; 54 L. Ed. 106, affirming 102 Tex. 376;

117 S. W. 436; *Clark v. Southern Pacific Co.* 175 Fed. 122; *Nashville, C. & St. L. Ry. Co.* 128 U. S. 96; 9 Sup. Ct. 28; 32 L. Ed. 352. In the last case Justice Field says: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualification and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject."

<sup>51d</sup> This was an action brought to recover damages for an injury sustained in a territory.

of the case, by which the rights of the employee and the liability of the carriers are measured. The very subject-matter of the controversy is federal.”<sup>51a</sup>

**§ 20. Act of 1906, validity in District of Columbia and Territories.**—The act of 1906 was held invalid also as to a cause of action arising in the District of Columbia.<sup>52</sup> And the same holding was made with respect to the territories.<sup>53</sup>

**§ 21. Construction of statute.**—As this statute was enacted for the benefit of the employe, and is an implied declaration on the part of the Congress that the old and harsh rules of the common law were inadequate for the protection of his life and limbs when applied to the new and changed conditions of industrial life under which he is compelled to render services in order to gain a livelihood, and thereby not become a burden on the public for support in case of his injury, it is to be liberally construed so as to carry out the intention of the legislature. The argument of hardship upon the railroad company is not to be considered. That argument is plausible “only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employe and the public.” When an injury happens to an employe, there must be a hardship to him. “If its burden is transferred, so far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such in-

<sup>51a</sup> *Cound v. Atchison, T. & S. F. Ry. Co.* 173 Fed. 527; *Taylor v. Southern Ry. Co.* 178 Fed. 380.

“There is a count in the declaration omitting the statement that the petitioner and defendant company were engaged in interstate commerce at the time of the alleged injury, the Employer’s Liability Act, superseding all other law, will be controlling on the question of the jurisdiction of this court and the right of removal.” *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 318.

A state court has held that the action must be brought under this statute where the employee is injured in the forwarding of interstate traffic. *Bradbury v. Chicago, R. I. & Pac. Ry. Co.* 149 Iowa, 51; 128 N. W. 1.

<sup>52</sup> *Hyde v. Southern Ry. Co.* 31 App. D. C. 466. But see same case, 36 Wash. L. Rep. 374.

<sup>53</sup> *Atchison, etc., Ry. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. Rep. 480.

juries,<sup>54</sup> and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who would measurably control their causes, instead of upon those who are in the main helpless in that regard."<sup>55</sup> In construing the Safety Appliance Act, Chief Justice Fuller said: "The primary object of the act was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect that it was remedial, while for violations a penalty, one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collector of customs, that rule not requiring absolute strictness of construction."<sup>56</sup> Of course, in the Federal Employers' Liability Act no quasi offense is involved—only a civil liability; but the above quotation, aside from reference to the penal offense, is quite applicable. "The statute is remedial in the character, and it should be so construed as to prevent the mischief and advance the remedy."<sup>57</sup> In another case it was said: "The statute in question, while it is remedial in the sense that it affects the remedy in accident cases, is not of the nature of those remedial statutes which have received a liberal and expansive application at the hands of the court, such as statutes intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof."<sup>58</sup>

<sup>54</sup> Injury by unlawful couplings.

<sup>55</sup> *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 210; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

<sup>56</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363, reversing 117 Fed. Rep. 462; 54 C. C. A. 508; *United States v. Illinois Central*

*R. Co.* 177 Fed. 801; *United States v. Chicago, R. I. & P. Ry. Co.* 173 Fed. 684.

<sup>57</sup> *St. Louis, M. & S. Ry. Co. v. Conley*, 187 Fed. 949.

<sup>58</sup> *Winfrey v. Southern Pacific Ry. Co.* 173 Fed. 65; *Fulgham v. Midland Valley R. Co.* 167 Fed. 660.

## CHAPTER III.

### TO WHAT RAILROADS STATUTE APPLIES.

#### SECTION

- 22. Carriers within territories.
- 23. Carriers engaged in interstate commerce.
- 24. Interurban and street railway common carriers.

#### SECTION

- 25. "While engaged in commerce between the states."
- 26. Illustrations on interstate commerce transactions.

§ 22. **Carrier within Territories.**—Congress has plenary power in all matters pertaining to the territories, the District of Columbia, the Panama Canal Zone, and other possessions of the United States. A common carrier by railroad in such divisions of the United States is liable "to any person suffering injury while he is employed by such carrier in any of said jurisdictions." The statute, of course, covers the territory of Alaska, the District of Columbia, Porto Rico, Hawaiian Islands and the Philippine Islands.

§ 23. **Carriers engaged in interstate commerce.**—The common carrier must be one "by railroad." No other common carrier is covered by the statute. It must be a "common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations." Therefore, any railroad company carrying commercial products from one state to another, or from a state to a territory or *vice versa*, or from a state to the



District of Columbia or *vice versa*, or from a state or territory to a foreign nation, as to New Mexico or to Canada, or to British Columbia, comes within its provisions. So if a common carrier by railroad carry commercial products from the interior of a state bordering on the seashore and then load it upon its own ocean going vessels and carry it to a foreign port, it would be engaged in commerce between such state and a foreign nation; and likewise it would be so engaged even though it did not have its own vessels if it undertook to secure their transportation across the ocean to a foreign port. But if it only undertook to transport and deliver them to a consignee at the seaport, and such consignee was to forward them to a foreign nation, it would not be engaging in commerce between a state and a foreign nation. Yet if it accepted goods billed and addressed to a foreign nation and undertook to deliver them to a company or vessel engaged in transporting articles to the port of the destination of such goods it would be engaged in commerce between a state and a foreign nation.<sup>1</sup> Difficult questions necessarily arise when a question not purely of interstate commerce is involved. The Safety Appliance Act, however, affords a reasonable analogy and in a measure solves some of the questions that arise. That statute provides that "any common carrier engaged in interstate commerce by railroad" shall equip its cars with automatic couplers. The Employers' Liability Act applies to a "common carrier by railroad while engaging in commerce between any of the several states." There is practically no difference in meaning between these two phrases of these two statutes so far as designating the common carriers to which they are applicable. Under the Safety Appliance Act it has been held that a railroad wholly within a state—not even so much as touching the boundary line of the state—may be engaged in interstate traffic and be liable to equip its cars in accordance with its provisions.<sup>2</sup> And so it has

<sup>1</sup> The distinction is a fine one, under the Safety Appliance Act. but it is justified by the decisions See Secs. 173, 175.

<sup>2</sup> See Secs. 169, 175.



been held that the same railroad (situated in Colorado)—a narrow gauge road—was engaged in interstate traffic when it received express packages of an express company, shipped by such express company from Kansas City, Missouri, delivered to it within the state of Colorado, and re-shipped by transferring from the car of an interstate commerce railroad to its own narrow gauge cars, the packages being billed to a station on its road.<sup>3</sup> On the contrary, in an instance similar to the first instance given, where a narrow gauge road, wholly within the state of Ohio, operated in connection with the Baltimore and Ohio Railroad, where the goods were of necessity transferred from a narrow gauge car to a wide gauge car, it was held that such narrow gauge road was not engaged in interstate commerce.<sup>4</sup> The latter decision is, however, sharply criticised in the former decision;<sup>5</sup> and to the author the reasoning in the Colorado case rests upon a sounder basis. So under the Interstate Commerce Act it has been held that a belt railroad, used to transfer freight cars around a city, and so prevent their transportation through said city, having connections with interstate commerce railroads, was subject to such act.<sup>6</sup> So the movement of cars in the car yards of a railroad, such cars not being properly equipped with automatic couplers, but which had been brought by such railroad from another state, was a violation of that act.<sup>7</sup> Likewise it has been held that a railroad company carrying from one state to another on its own construction cars, its own iron rails, in cars not properly equipped with automatic brakes, was liable to the penalty of the act imposed for using insufficiently equipped cars in interstate commerce.<sup>8</sup> The phrase “while engaging in commerce between any of the several states” is, especially in the light of these decisions, a very broad and far-reaching one. Of course, while transporting freight having its origin in a state to another point within the same state, not in connection with

<sup>3</sup> See Secs. 160, 175.

<sup>4</sup> See Sec. 175.

<sup>5</sup> See Sec. 176.

<sup>6</sup> See Sec. 163.

<sup>7</sup> See Secs. 162, 164, 165.

<sup>8</sup> See Sec. 155.

other freight brought from another state, would not be engaging in interstate commerce or commerce between the states; and an employe of the company injured while engaged in such commerce could not come within the provisions of the statute if he was injured; but if there was a single car load of products in the train en route from another state to a point within the state of destination, that would convert the entire train into an interstate commerce relation, and the railroad company would then be engaged in commerce between the states.<sup>9</sup>

<sup>9</sup>See illustrations of Justice White quoted in Section 13.

This phase of the subject did not escape the attention of the able lawyers in the Senate. This debate took place in part in the Senate:

Senator Bacon: "Now, I want to ask the Senator a question by way of illustration. Of course, never mind how large a train may be and how full of goods it may be, all the balance of it may be intrastate freight, but if upon that train there is one single box that is to cross the line, it makes the train engaged in interstate commerce. I want to illustrate it to the Senator [Dolliver of Iowa] by a concrete case. We will suppose that a train starts from Richmond [Va.] to Alexandria [Va.]. These are terminal points for the train. It has freight consigned exclusively to Alexandria or to points between Richmond and Alexandria. That makes it altogether out of the jurisdiction of this bill; but if at Orange Court House [Va.], on the way, a man puts on it a box of cigars which is consigned to a party in Baltimore, that would immediately change the character of the train, would it not, and

make it after that a train engaged in interstate commerce?"  
 . . . .

Mr. Dolliver: "I will say to the Senator, if I understand correctly the decisions of the Supreme Court, that they are to the effect that a railroad that is entirely within a state, but carrying commerce destined to points outside the state, is engaged in interstate commerce and is subject to the interstate commerce act."

Mr. Bacon: "That is a clear statement of the law. Then I am correct in the suggestion that on a train leaving Richmond and coming to Alexandria, those being terminal points, having no freight except for Alexandria and intermediate points, if, when it reached Orange Court House, a box of cigars was put on it, consigned to Baltimore, it would be converted at once from a train not subject to the provisions of this act into one that is subject to it. Am I not correct in that, I ask the Senator from Iowa? I am correct in the conclusion that at Orange Court House it will be converted into a train, employees of which would become engaged in interstate commerce, and everything

## § 24. Interurban and street railway common carriers.—

An interesting phase of the question now under discussion is that pertaining to common carriers by the so-called interurban electric railways and by street railways. The former partake more of the character of a common carrier by steam railroad than the latter, and in principle do not differ from them. It is beyond discussion that the statute includes all common carriers by electric interurban railroads when engaged in interstate commerce. There are many instances, also, where common carriers by street railroads pass from one state to another and carry passengers across state lines. Such is the case between Kansas City, Missouri, and Kansas City, Kansas; so between New Albany and Jeffersonville, Indiana, and Louisville, Kentucky; so between Cincinnati, Ohio, and Covington, Kentucky; so between the District of Columbia and Alexandria, Virginia; and so between Niagara

would be subject to this law at this point, and from there to Alexandria."

Mr. Dolliver: "I have no doubt that is true."

Mr. Bacon: "Very well. The point I want to ask the Senator is this: If on the line of road between Richmond and Orange Court House an accident occurs, the rule of liability would be determined by the law of Virginia, because there would be no interstate commerce; but after the box of cigars had been put on at Orange Court House if an accident and an injury occurred between there and Alexandria, although it was the same train and the same crew and the same people, the rule of liability would be determined by this law. If the injury was incurred before the train reached Orange Court House, the case would go into the state court, and be determined by Virginia law. But after the box of cigars had been put on the train at Orange Court House, if an injury occurred to the crew of the same train, the case would go into the federal court and be de-

termined by the act of Congress as to the rule of liability. Am I correct in that?"

Mr. Dolliver: "If the court will agree with the judgment of the Senator."

Mr. Bacon: "I just simply wished to know the opinion of the Senator. These are intricacies of the law which I thought it was well the Senator should inform us about."

Mr. Dolliver: "All those questions have been discussed in the court and the laws between interstate and state commerce fairly well defined."

Mr. Bacon: "That would be the effect in this particular case." 60 Cong. Record, 1st Sess., p. 4547.

See, also, *Horton v. Seaboard Air Line R. Co.* (N. C.) 72 S. E. 958. Just how far the holding of the United States Supreme Court in *Sec. 159* will be followed is difficult to say. In that case it was held that if a railway company made its railroad "a highway of interstate commerce," then an empty car moved wholly within a state over such railroad

City, New York, and Canada. Other illustrations might be named. These several common carriers by street railroads are beyond question common carriers by railroad; and when transporting passengers (or even freight as they sometimes do) from one state to another are beyond question common carriers engaged in interstate commerce. The Federal Employers' Liability Act clearly applies to them; and the employes of such street railways while engaged in the transporting of such passengers (and freight), if injured, can invoke the provisions of this statute in securing redress for their injuries.<sup>10</sup> It should not be forgotten that street railway companies are always in other matters treated as common carriers.<sup>10\*</sup>

§ 25. "While engaging in interstate commerce between the states."—More than fifty years ago the Supreme Court decided a case involving interstate commerce which is instructive in this connection, and which was relied upon in the Colorado decision.<sup>11</sup> We make the following quotation from the earlier case in this connection: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought within the state from without its limits but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels porting goods destined for other states, or goods brought was engaged entirely in domestic commerce. But this con-

was subject to the Safety Appliance Act of 1893, and must be equipped as that statute required cars used in interstate traffic. See, also, *Southern Ry. Co. v. United States*, 222 U. S. —; 32 Sup. Ct. 2; 56 L. Ed. —, and *Horton v. Seaboard Air Line R. Co.* (N. C.) 72 S. E. 958, where an application of the safety appliance cases was made to a case of negligent injury under this statute.

<sup>10</sup> It has been held that the Federal Safety Appliance Act does

not apply to the equipment of an interstate electric railroad, so as to require automatic couplers on the cars where such cars are not used in trains. *Campbell v. Spokane & I. E. R. Co.* 188 Fed. 516.

<sup>10\*</sup> *Omaha & C. B. St. Ry. Co. v. Inter. St. Com. Co.* 191 Fed. 40. See *Wilson v. Rock Creek R. Co.* 7 Interstate Commerce Rep. 83, and *West End Improvement Club v. Omaha & C. B. Ry. & R. Co.* 17 Interstate Commerce Rep. 239.

<sup>11</sup> See Secs. 160, 175.



clusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce, for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress. It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely



ousted, and the constitutional provision would become a dead letter."<sup>12</sup> Where a railroad wholly within the State of Georgia transported freight originating in Cincinnati, Ohio, over line to its destination, upon through bills of lading, a through charge and assignment of the entire charge among the roads contributing to the movement having been entered into, the Georgia railroad, was held to be engaged in interstate commerce.<sup>12\*</sup>

**§ 23. To whom common carriers by railroad liable.**—It is clear that a common carrier by railroad is not liable under the statute to any one except its employees. The statute has

<sup>12</sup> The *Daniel Ball*, 10 Wall. 567; 19 L. Ed. 999, reversing *Brown*, Admr. Cas. 193; Fed. Cas. No. 3,564.

<sup>12\*</sup> *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, 162 U. S. 184. For an illustration where, the facts being very similar, the state road was held not to be engaged in interstate commerce, see *Gulf, etc., R. Co. v. Texas*, 204 U. S. 403; 24 Sup. Ct. Rep. 360; 51 L. Ed. 540; affirming 97 Tex. 274.

An employee engaged in taking goods, shipped from another state, from the car, in which they were transported, across the station platform to the freight depot, is engaged in interstate commerce transportation. *Rhodes v. Iowa*, 170 U. S. 412. Coal brought from beyond the state does not cease to be interstate transportation until actually delivered to the consignee. *McNeill v. Southern Ry. Co.* 202 U. S. 543; 26 Sup. Ct. Rep. 722; 50 L. Ed. 1142.

But a cab owned by a railroad and used to carry passengers from a ferry to its hotel is not used in interstate commerce. *Pennsylvania Ry. Co. v. Knight*, 192 U. S. 21, the court saying: "If a cab which carries passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who

carries the traveler's trunk from his room to the carriage also engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses, also engaged in interstate commerce, and where will the limit be placed? We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation." Perhaps the gathering of freight from the place of business of shippers and distributing freight to such places of business by vehicles employed by a railroad does not make the carriage between such place of business and the freight station of the carrier a part of an interstate journey. *Interstate Commerce Commission v. Detroit, etc., R. Co.* 167 U. S. 633; affirming 74 Fed. Rep. 833; reversing 57 Fed. Rep. 1005.

Judge Cooley, in an address before the First General Conference of Railroad Commissioners, at Washington, D. C., March, 1889, said: "But there is scarcely a line of railroad in the country so short or so insignificant that the method in which its operations shall be conducted is not of something more than local importance, or the character of its regulation of some concern to business in-

## § 26. Illustrations on Interstate Commerce Transactions.

—A company engaged in the business of imparting instruction “by means of correspondence through the mails between the company at its office \* \* \* and the applicant at his residence in another state” is engaged in interstate commerce.<sup>12a</sup> So the transmission of intelligence from state to state by the telegraph is interstate commerce.<sup>12b</sup> To constitute interstate commerce it is not necessary that the carrying company should own the products or materials it carries; and the fact that it does not does not change the rule;<sup>12c</sup> and it is immaterial that the shipment is interrupted in transit at the state line.<sup>12d</sup> A railroad is engaged in interstate commerce the instant it begins the carriage of an article from one state to another; and the character of the commerce continues without cessation until it reaches its destination.<sup>12e</sup> Participation by a carrier in the transportation of goods destined from a place in one state to another

terests beyond the state limits. It may be a link in a long line extending through two or more states. It may be the principal or perhaps the sole means of transportation for the products of a mine or other important industry which supplies many states, but whether of greater or less importance, it has relations to other roads which are not and can not be wholly limited within any political division of the country, however extensive it may be; even the little Catskill Mountain Railroad, by the issue of coupon tickets to San Francisco, may, in a sense, become a part of a transcontinental highway, and the citizen from the Pacific Coast who applies for one of the tickets has an interest in the treatment he shall receive in respect to it, which is precisely the same that it would be if all the roads of the country were one in ownership and in management.”

<sup>12a</sup> International Text Book Co. v. Pigg. 217 U. S. 91; 30 Sup. Ct. 481; 54 L. Ed. 678.

<sup>12b</sup> Pensacola Tel. Co. v. Western, 96 U. S. 1; 24 L. Ed. 708; Western Union Tel. Co. v. Pendleton, 122 U. S. 347; 7 Sup. Ct. 1126; 30 L. Ed. 1187; reversing 95 Ind. 12; Butler Bros. Shoe Co. v. United States Rubber Co. 156 Fed. 1.

<sup>12c</sup> United States v. Chicago, M. & St. P. Ry. Co. 149 Fed. 486.

<sup>12d</sup> Gulf C. & S. F. R. Co. v. Fort Grain Co. (Tex. Civ. App.); 73 S. W. 845; United States v. Colorado & N. W. R. Co. 157 Fed. 321; United States v. Chicago, M. & St. P. Ry. Co. 149 Fed. 486.

<sup>12e</sup> McNeil v. Southern Ry. Co. 202 U. S. 543; 26 Sup. Ct. 722; 50 L. Ed. 1142; In re Greene, 52 Fed. 104; Chicago, M. & St. P. Ry. Co. v. Voelker. 129 Fed. 522; United States v. Central of Georgia Ry. Co. 157 Fed. 893; Belt Ry. Co.

place in another state, brings such carrier within the regulations of the Federal Government, whether the participation consists in a division under a joint rate of transportation, or such carrier merely constitutes a link in the through route for such transportation.<sup>12f</sup> So the carriage of goods from one point in a state to another point in the same point, but through a portion of another state in the route, is interstate commerce.<sup>12g</sup> To make the carriage of traffic an engagement in interstate commerce it is not necessary that the car bearing it shall cross a state line, if such traffic is destined to a point beyond the line of such state; nor when the line of the railroad carrying it extends beyond such border line.<sup>12h</sup> To switch interstate cars is to engage in

v. United States, 168 Fed. 542; United States v. Boyer, 85 Fed. 425.

<sup>12f</sup> United States v. Standard Oil Co., 155 Fed. 305; Parsons v. Chicago & N. W. Ry. Co. 167 U. S. 447; 17 Sup. Ct. 887; 42 L. Ed. 231; Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184; 16 Sup. Ct. 700; 40 L. Ed. 935; Chicago & N. W. Ry. Co. v. Osborn, 52 Fed. 912; Norfolk and W. R. v. Pennsylvania. 136 U. S. 114; 10 Sup. Ct. 958; 34 L. Ed. 394; reversing 114 Pa. 256; 6 Atl. 45; Belt Line Ry. Co. v. United States, 168 Fed. 542.

<sup>12g</sup> Hanley v. Kansas City So. Ry. Co. 187 U. S. 617; 23 Sup. Ct. 214; 47 L. Ed. 333; affirming 106 Fed. 353; New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co. 2 Interstate Com. Rep. 289; Sternberger v. Cape Fear & S. V. R. Co. 29 S. C. 510; 7 S. E. 836; Mires v. St. Louis & S. F. Ry. Co. 134 Mo. App. 379; 114 S. W. 1052; St. Louis & S. F. R. Co. v. State, 113 S. W. 203; Davis v. Southern Ry. Co. 147

N. C. 68; 60 S. E. 722; Shelby Ice & Fuel Co. v. Southern Ry. Co., 147 N. C. 61; 60 S. E. 721; United States v. Erie R. Co. 166 Fed. 352; Kansas City So. Ry. Co. v. Railroad Commission, 106 Fed. 359; State v. Chicago, St. P., M. & O. R. Co. 40 Minn. 267; 41 N. W. 1047. But see, Seawell v. Kansas City F. & S. & M. R. Co. 119 Mo. 222; 24 S. W. 1002; Campbell v. Chicago, M. & St. P. Ry. Co. 86 Iowa, 563; 53 N. W. 323; United States v. Lehigh Valley R. Co. 115 Fed. 373; Lehigh Valley R. Co. v. Commonwealth (Pa.), —, —, —; 18 Atl. 125; Commonwealth v. Lehigh Valley R. Co. (Pa.) 17 Atl. 179.

<sup>12h</sup> Ex parte Koehler, 30 Fed. 867; United States v. Colorado & N. W. R. Co. 157 Fed. 321; United States v. Pacific Coast Ry. Co. 173 Fed. 448; Covington & O. Bridge Co. v. Kentucky, 154 U. S. 204; 14 Sup. Ct. 1087; 38 L. Ed. 952; reversing 15 Ky. L. Rep. 320; 22 S. W. 851; Texas & N. O. R. Co. v. Sabine Transportation Co. 121 S. W. 256; Augusta S. R. Co. v. Wrightsville & T. R.

interstate commerce.<sup>121</sup> But if goods be shipped into a state and then delivered to the consignee; and he then ships them to a point within such state, this is not a shipment in interstate commerce.<sup>122</sup>

Co. 74 Fed. 522; *United States v. Delaware, L. & W. R. Co.* 152 Fed. 269; *Interstate Commerce Commission v. Bellaire, Q. & C. Ry. Co.* 77 Fed. 942; *Interstate Commerce Commission v. Seaboard A. L. Ry. Co.* 82 Fed. 563; *Missouri, R. & T. Ry. Co. v. New Era Milling Co.* 80 Kan. 141; 101 Pac. 1011; *Rhodes v. Iowa*, 170 U. S. 412; 18 Sup. Ct. 664; 42 L. Ed. —.

<sup>121</sup>*Johnson v. Southern Pacific R. Co.* 196 U. S. 1; 25 Sup. Ct. 158; 49 L. Ed. 363; reversing 117 Fed. 462; 54 C. C. A. 508; *Crawford v. New York C. & H. R. R. Co.* 10 Amer. Neg. Rep. 166; *United States v. Pittsburg, C., C. & St. L. Ry. Co.* 143 Fed. 360; *Mobile,*

*J. & K. C. R. Co. v. Bromberg*, 37 So. 395; *Union Stock Yards Co. v. United States*, 169 Fed. 404; *Chicago, M. & St. P. R. Co. v. United States*, 165 Fed. 423; *United States v. Northern Pacific Terminal Co.* 144 Fed. 861; *Belt Ry. Co. v. United States*, 168 Fed. 542; *Wabash R. Co. v. United States*, 168 Fed. 1; *Rosney v. Erie R. Co.* 135 Fed. 311.

<sup>122</sup>*Coe v. Erroll*, 116 U. S. 517; 6 Sup. Ct. 475; 29 L. Ed. 715; affirming 62 N. H. 303; *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 167 U. S. 633; 17 Sup. Ct. 986; 42 L. Ed. 306; affirming 74 Fed. 803; 21 C. C. A. 103.

## CHAPTER IV.

### TO WHAT EMPLOYEES STATUTE APPLIES.

#### SECTION

- 27. Only liable to its own employees.
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#### SECTION

- 35. When employee enters on his work or is entitled to the protection of the statute.
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- 43. Validity of statute allowing a recovery for an injury occasioned by an interstate employee.

§ 27. **Only liable to its own employees.** It is clear that a common carrier by railroad is not liable under the statute to any one except its own employees.

§ 28. **What employee may bring his action upon the statute.**—It is an interesting question, concerning what employe may bring his action upon the statute, or claim a right to recover damages thereupon for his injuries. It is tautology to say that he must have been an employe of the



defendant at the time of the injury and be injured in the line of his duty. That is elementary and need not be discussed. In fact, it is here assumed. The statute in part answers the question when it provides that "every common carrier by railroad while engaging in commerce between any of the several states," "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." This last quoted clause designates the employe who can recover for his injuries; for he must be injured "while he is employed by such carrier in" commerce between the states or between the states and territories. Of course, if he is injured in a territory or the District of Columbia, or in the Panama Canal Zone, "or other possessions of the United States," while in the employ of a common carrier by railroad, it is immaterial whether he was engaged "in such commerce" or not; because the provisions of the statute with reference to the territories and such district, zone and "other possessions," are broader than those relating strictly to interstate commerce carriers, and necessarily so; for in the latter instance a constitutional question is involved that is not involved in the former instance. The word "while" is significant; for by its terms the employe must be engaged in interstate commerce in order to enable him to recover under the statute. If he be an employe of the railroad company and at the time of his injury be not engaged in interstate commerce, he cannot recover under the provisions of the statute. Of course, all trainmen while actually at work in train work would be engaged in interstate commerce; and perhaps telegraph operators engaged in telegraphing train orders. But whether engine wipers, car repairers in shops, section hands, bridge builders, carpenters engaged in constructing railroad buildings, would or would not be, while so at work, engaged in interstate is a subject of controversy. And it has been said to be a strained construction of the statute to say that yardmen in making

up a train to be hauled in interstate commerce would be engaged in such commerce; although the trainmen of such train would be, and especially so in taking on or setting off cars at intermediate stations.<sup>1</sup>

<sup>1</sup> In the debate upon this proposition there was some difference of opinion as to the scope of the statute and the employees of an interstate commerce railroad who came within its provisions. Senator Beveridge, of Indiana, thought an employee of a railroad company 100 miles away from its line of road felling trees for its use would come within its provisions; but Senator Dolliver, of Iowa, called his attention to the clause of the proposed statute, and asked: "But are they employed in such commerce, in interstate commerce?" and added that he considered the statute clear as it stands now. 60 Cong. Record, 1st Sess., p. 4542.

In discussing the Act of 1906, which contained a similar provision, Justice White said: "Thus, the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from the negligence of any of its officers, agents or em-

ployees." Employers' Liability Cases, *supra*.

The following extract is made from the report of counsel for railroad companies held July 13, 14 and 15, 1908, at Atlantic City, upon the question under discussion:

"A most important and difficult question is presented when we come to inquire when an employee is 'employed in such commerce.' There are engaged by railroad companies various classes of employees. There are those engaged in the operation of trains. There are those engaged in switching service in yards. There are those engaged in round houses, who receive engines coming off the road and make light repairs upon them and send them out. There are those engaged in maintenance of the depots, tracks and bridges. There are the freight handlers, loading and unloading freight. There are clerks in freight offices and in the general offices of the railroad. Does this Act apply to all of these employees?

"On a railroad engaging in interstate commerce it would be difficult to say that any one of these employees is not at some time performing some service having a direct relation to interstate commerce. The Supreme Court of the United States has laid down the proposition in more than one case that a thing may be within the letter of the statute and not within its meaning, and within its meaning though not

As the employe must be engaged in the interstate commerce of his employer, from the very nature of the ques-

within its letter; that the intention of the law maker is the law; that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers. These cases are gathered in *Hawaii v. Manchiki*, 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. Ed. 1016. We are, then, to ascertain what is the purpose of this Act.

"We suppose it can be fairly said that its purpose is to render the transportation of persons and property safe and to protect employees engaged in such transportation; in other words, that this Act is similar in its purposes to the Acts requiring safety appliances and fixing the hours of service of telegraph operators and persons employed in transportation. Probably this can be broadened so as to include within the intention of the Act all persons whose hours of service and whose protection Congress could legitimately consider as necessary to securing the safety of passengers and freight moving in interstate commerce. And we think that in this view a sensible construction of the Act would eliminate those persons whose service so remotely relates to such safety as not to be fairly within the regulating power of Congress.

"In another part of this report the question is discussed as to what are the classes of employees who can be fairly selected as having an employment involving a

hazard not considered in ordinary employment. It is there pointed out that various statutes have been passed from time to time abolishing or limiting the rule of fellow servant, some of these statutes in terms applying only to those engaged in the operation of a railroad, and others being construed as limited in this respect, although the statutes are not in terms so limited. Some illustrations may be drawn from these cases.

"Thus the Supreme Court of Iowa held that the statute of that state applied only to those dangers which were peculiar to railroad operation.

"In *Luce v. R. Co.* 67 Iowa, 75, 24 N. W. 600, the plaintiff was employed in a coal house of a railroad company and while hoisting coal for the purpose of coal-ing an engine was struck by a crane by which the coal was hoisted, due to the negligence of a fellow servant. It was held that the statute did not apply.

"In *Foley v. R. R. Co.* 64 Iowa, 644, 21 N. W. 124, a recovery was denied to a car repairer for injuries he received while repairing a car on a side track, by reason of the alleged negligence of a co-employee in failing to block the wheels of the car.

"In *Stroble v. R. R. Co.* 71 Iowa, 555, 31 N. W. 63, a recovery was denied to an employee of a railroad company who was injured by the giving way of certain steps leading up to a platform for loading coal.

"In *Malone v. R. Co.* 65 Iowa, 417, it was held that an employee

tion, his employer at the moment of the injury must be engaged in interstate commerce, not generally but in that

of a railroad company employed in wiping off engines, opening and closing the doors of the engine house, removing snow from the turntable and tracks and turning the turntable when engines were being run between the main track and the engine house, was not engaged in the operation of a railroad within the statute.

"In *Reddington v. R. R. Co.* 108 Iowa, 96, 78 N. W. 800, it was held that the railroad company was not liable to a brakeman for injuries received while he was assisting in coaling an engine, through the negligence of a co-employee in operating the hoisting crane so as to knock him from the platform, such movement not being necessary in order to permit the train to start.

"The Supreme Court of Minnesota has construed its Employers' Liability Act as applying only to those employees of railroads engaged in the operation of railroads.

"In *Johnson v. R. Co.* 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, a crew of men, of whom the plaintiff was one, were engaged in repairing a bridge on defendant's railroad. In performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew the draw was left unfastened. It was blown part shut by the wind and injured plaintiff while he was at work between the stationary part of the bridge and the draw. It was held that the statute did not apply.

"In *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. Rep.

159, 50 L. Ed. 322, affirming 93 Minn. 63, 100 N. W. Rep. 681, the judgment of the Supreme Court of Minnesota reported in 93 Minn. 63, was affirmed. It appeared in that case that the court had allowed a recovery for the loss of an arm by the plaintiff, while repairing an engine of the defendant, through the negligence of a fellow servant.

"In *Jemming v. R. R. Co.* 96 Minn. 302, 104 N. W. 1079, the plaintiff was injured while employed by the railroad company as a pitman. He was one of a crew of nine men operating a steam shovel in a gravel pit, and was injured through the negligence of a fellow servant. It was held that the statute did not apply for the reason that plaintiff and his fellow servants by whose negligence he was injured, were not engaged in operating a railroad at the time of the accident.

"The Kansas statute is given in *Missouri Ry. v. Mackey*, 127 U. S. 206; 8 Sup. Ct. Rep. 1161; 32 L. Ed. 107; affirming 33 Kan. 298; 6 Pac. Rep. 291. It was there held, affirming the judgment of the Supreme Court of Kansas, that a fireman on an engine employed in transferring cars from one point to another in a yard when it was run into by another engine owing to the negligence of the engineer or the latter, could recover.

"But in *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875, it was held that Medaris, who was employed in setting a curbing around an office building and depot of the railroad com-



specific instance, and in that identical commerce he must be injured if he recovers under the statute.

pany at Parsons, Kansas, could not recover.

"In *Chicago, etc., R. R. Co. v. Pontius*, 154 U. S. 209; 15 Sup. Ct. Rep. 585, 39 L. Ed. 675, affirming 52 Kan. 264, 34 Pac. Rep. 739, a judgment was sustained in favor of Pontius, who was a bridge builder, the Supreme Court saying: 'He was engaged at the time the accident occurred not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road.'

"In *Chicago, R. I. & P. R. R. v. Stahley*, 62 F. R. 363, Mr. Justice Brewer, in an opinion written by him for the Circuit Court of Appeals for the English Circuit, held that the statute applied to a workman in a round house who was injured while getting a locomotive ready for immediate use, and that he could recover for his injury notwithstanding it was occasioned by the negligence of a fellow servant. Mr. Justice Brewer said:

"He was not engaged in repairing an old engine or constructing a new one, but in putting that engine, which had recently arrived, in condition for immediate use. He was \* \* \* not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly re-

lated to the movement of trains—as much so as that of repairing the track.'

"In *Indianapolis U. Ry. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, the court held that the statute applied to a telegraph operator stationed at a track junction and whose duties required him to cross the railroad tracks, and who, while so doing, was struck by a train running twenty miles an hour but which gave no warning of its approach.

"In *Pittsburgh, etc., R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033, the plaintiff was a passenger train engineer and was standing between two railroad tracks where he had gone to take charge of his engine, when he was knocked down and injured by another train of the railroad company, in the city of Logansport, Indiana. It was held that the statute applied and that he could recover.

"In *Southern Ind. R. R. Co. v. Harrell*, 161 Ind. 262, 68 N. E. 262, the railway company was engaged in the construction of a railroad bridge over White River. A heavy stone was being lifted by a derrick. One of the employees was injured by the negligent handling of this apparatus. It was held that he could not recover under the statute.

"In *Indianapolis & G. R. Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, the plaintiff, an employee of the railroad company engaged in the construction of a track, was injured while being transported to his home in the work car of the company, by reason of the negli-



§ 29. **Track repairer.**—A track repairer engaged in repairing a track over which both interstate and intrastate trains move is embraced within the provisions of this statute. "The track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, in-

gence of the employees of another train. It was held that he could not recover.

"In *Pittsburg R. R. Co. v. Ross*, 169 Ind. 3, 80 N. E. 845, a switchman injured by the movements of cars in a switch yard was held entitled to recover.

"In *Indianapolis T. & T. Co. v. Kinney*, by etc., 171 Ind. 619, 85 N. E. 954, the Supreme Court of Indiana held that a member of a section gang who was injured by the negligence of a fellow laborer while unloading steel rails from a car could not recover.

"It is, however, to be stated that the courts in certain other states have been much more liberal in the construction of employers' liability acts than some of the northwestern states whose opinions we have cited.

"Thus, in *Callahan v. St. L. Mer. B. Co.* 170 Mo. 473, 60 L. R. A. 249, 71 S. W. 208, affirmed in 194 U. S. 628, it was held that where certain workmen were on a railroad trestle which crossed a street in St. Louis and were throwing timbers down into the street, an employee of the company whose duty it was to warn pedestrians was entitled to recover for an injury received through the negligence of the workmen on the trestle, it being held that he was engaged in the operation of the road.

"In *Texas & P. R. R. Co. v. Carlin*, 111 F. R. 777, 189 U. S. 354, 23 Sup. Ct. Rep. 585, 47 L.

Ed. 849, it was held that an employee could recover who was repairing a bridge while trains were using it and was injured by being struck with a spike maul which had negligently been left on the bridge track by the bridge foreman.

"In *Georgia, etc., R. Co. v. Miller*, 90 Ga. 571, a brakeman was injured while under a disabled engine out on the road. It was held that he could recover notwithstanding his injury was caused by the negligence of a fellow servant.

"In *Hancock v. Norfolk, etc., R. Co.* 124 N. C. 222, 32 S. E. 679, it was held that a section hand who was injured by reason of the handcar on which he was riding running into an open switch, negligently so left by a train brakeman, could recover.

"See also *Chesapeake & O. Ry. Co. v. Hoffman*, 63 S. E. 432, construing Section 163, Va. Const., 1902.

"That a car may be in use in interstate commerce although at the time empty, or about to start on a journey, or designed for company use and not for traffic, would seem to be held in such cases as *Voelker v. Railway Co.* 116 F. R. 867, affirmed 129 F. R. 522. See *U. S. v. I. C. R. R. Co.* 156 F. R. 183; *Johnson v. S. P. Co.* 196 U. S. 1; *Schlemmers v. V. R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 53 Atl. Rep. 417; *U. S. v. C. M. & St. P. R. Co.*, 149 F. R. 486, 490.

dispensable to the former. It is equally important that it be kept in repair. When the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local

"But, according to *Lurton, J.*, in *St. L. & S. F. Co. v. Delk*, 158 F. R. 939, a car set on a dead track for repair is not within the Safety Appliance Act (used in interstate commerce), 'any more than a car in a shop awaiting repairs.'

"If a train is engaged in interstate commerce, any employee employed on such train is employed in such commerce, and hence, if injured, is within the Act. This would embrace all trainmen.

"Again, if switching interstate cars in a yard or delivering interstate cars by a terminal company is engaging in interstate commerce, all switchmen so employed are within the Act.

"In this connection attention will be called to what is said by the Delaware Court in the case of *Winkler v. Philadelphia Railway*, 4 Penn. (Del.) 80; 53 Atl. 90. This was an action for damages. *Winkler* is described as head brakeman of a shifting crew which was using shifting engine Number 1242 and its tender in moving and delivering interstate commerce cars at the siding on the south side of Wilmington, the railroad, defendant, then and there being a common carrier of passengers and freight. In charging the jury the court said:

"If the tender and car were then in use in moving local traffic only, from point to point within the limits of this state, they could not be engaged in interstate commerce. If, however, the car being moved had come from a

point out of the state with freight to be here delivered it would be moving interstate commerce. This would be so even though the car to which the tender was being coupled was not the car used in interstate traffic, if the removal of such a car was a necessary step in getting out and moving said interstate car.'

"In this connection attention may also be called to the case of *Kansas City Ry. v. Flippo*, 138 Ala. 487; S. C. 35 Sou. 457.

"If Justice Brewer is right in his opinion in *Chicago R. L. & P. R. R. v. Stahley*, 62 F. R. 363, it would seem that all persons employed in round houses, and all persons employed in maintaining the track, and, it would follow, bridges, would be within the act. On the other hand, persons employed in the machine shops of the company, constructing or repairing its rolling stock, would not be within the act. And in this connection, as to car repairers, attention is called to what was said by Judge *Lurton*, as given above, in *St. Louis & S. F. Co. v. Delk*, 158 F. R. 939.

"As for car builders and repairers, clerks in freight offices and in general offices, we believe that they will not be held to be within the reason of the act, and, therefore, not entitled to its benefits. We believe that the same principle will be applied to freight handlers. We believe, however, that the Act will be held to apply to all persons engaged in the operation and physical maintenance of the road."

business and wholly within the borders of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but when, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both, to hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce or would be to deny the power to control and is a desirable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of their instrumentalities through which such commerce is carried on is not an open question.”<sup>2</sup>

“No doubt there may be situations, indeed we have the highest authority for it<sup>3</sup> when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as the engines or cars are undergoing repair, or in cases of clerical work or when the acts or things done are not physically or otherwise directly connected with the moving of traffic, where there could be no ground for claiming liability under the Act of Congress, even though the carrier, in fact be engaged in interstate as well as local traffic. But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce.

<sup>2</sup> Citing and quoting from *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452; 30 Sup. Ct. 155; 54 L. Ed. 280; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct.

826; 29 L. Ed. 158; *Weldon v. Wisconsin*, 91 U. S. 275; 23 L. Ed. 347.

<sup>3</sup> Citing *Employers' Liability Cases*, 207 U. S. 495; 28 Sup. Ct. 141; 52 L. Ed. 297.

Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to the Federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it can not defeat the superior power of Congress over the subject-matter, whenever a carrier is using the track for the double purpose.”<sup>4</sup>

**§ 30. Statute includes everybody Congress could include; same persons in different capacities; track repairer; telegraph operator.**—It has been held that a track repairer on an interstate railroad was within the provisions of this statute. So much of the opinion of the court as relates to the subject is as follows: “The present act \* \* \* I think should therefore be construed<sup>5</sup> as intending to include within the term ‘person employed in such commerce’ all those persons who could be so included within the constitutional power of Congress, that is to say, the act meant to include everybody Congress could include. Under this construction the inquiry becomes whether Congress could constitutionally have passed a statute regulating the relation between a carrier-master and a servant who was engaged in the repair of a track used both for interstate and intrastate commerce. Preliminarily the distinction should be noted that the act will not necessarily apply to the same person in all details of his employment. One man might have duties including both interstate and intrastate com-

<sup>4</sup> *Zikos v. Oregon R. & N. Co.* 179 Fed. 893, citing *In re Debs*, 158 Fed. 564; 15 Sup. Ct. 500; 39 L. Ed. 1092, and *Ex parte Siebold*, 100 U. S. 371; 25 L. Ed. 717.

The same result was reached in the case of an employee injured by a local train while repairing a

switch. *Colasurdo v. Central Railroad of New Jersey*, 180 Fed. 832.

<sup>5</sup> This said in view of the fact that the statute was enacted to escape the invalidity of the Act of 1906 as pointed out in the *Employers' Liability Cases*, 207 U. S. 463; 28 Sup. Ct. 141; 52 L. Ed. 297.



merce, and he would be subject to the act while engaged in one and not the other. This being so, the question is whether his repairing of a switch is such employment, when the switch is used indifferently in both kinds of commerce. Suppose the track had crossed a corner of a state, and there was only one station within that state so that all trains crossing over that track must necessarily be engaged in interstate commerce. Would not a track worker engaged in the repair of such a track be engaged in interstate commerce? I do not think that he would be any the less so engaged than the engineer on the locomotive or the train dispatcher who kept the trains at proper intervals for safety. Of course, it is not necessary that the man must personally cross a state line. If the repair of such a track be interstate commerce, does it cease to be such because there are two stations within the state and some of the trains start at one and stop at the other? I cannot think that this is true, although counsel have referred me to no case upon the subject and I have found none. The track is none the less used for interstate commerce, because it is also used for intrastate commerce, and the person who repairs it is, I think, employed in each kind of commerce at the same time.

Despite the earlier ruling in *Gibbons v. Ogden*,<sup>6</sup> it has in recent times been stated several times by the Supreme Court that state statutes may indirectly regulate interstate commerce, even though Congress may at any time itself under its proper constitutional powers, enact a provision of directly opposite tenor.<sup>7</sup> If, as was held in those cases, a state has the power to regulate such commerce until Congress intervenes, because it is as well within the state's proper powers, must not the corollary be true as well, that Congress may intervene, even when the effect of that intervention be incidentally the regulation of intrastate commerce as well? Could not Congress, for example, provide that all

<sup>6</sup> 9 Wheat. 1; 6 L. Ed. 23.

*v. Colorado*, 187 U. S. 137; 23

<sup>7</sup> Citing *Sherlock v. Alling*, 93

Sup. Ct. 92; 47 L. Ed. 108.

U. S. 99; 23 L. Ed. 819; *Reid*



tracks used in interstate commerce must be of a standard width and weight? Would that not affect all tracks used in such commerce, although they likewise were used for intrastate commerce? Of course, anyone could use any other tracks he chose for intrastate commerce; but it can surely not be a ground to limit Congress's proper powers that the track has a joint use. If so, the repair of such tracks must be a part of interstate commerce, and under the Employers' Liability Cases,<sup>8</sup> the relations of master and servant arising between the railroad and its employees engaged in repairing the track are similarly within the power of Congress.

I am therefore of opinion that the plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only "while engaged" in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employees. In short, if the employee was engaged in such commerce, so was the road, for the road was the master, and the servant's act is its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."<sup>9</sup>

§ 31. **Car repairer in switching yard.**—In a case brought to recover damages it was shown that the plaintiff had been sent "to one of the different railroad's yards and assigned to the work of coupling up air hose, looking over brakes to see if they were all right, and to shop-mark any brake that was found broken." On the date of the injury an employee of the railroad, whose work was to couple up the air hose and make such light repairs as could be done upon the switching track, was unable to perform his duty that day, and the plaintiff was assigned and directed to do his work.

<sup>8</sup> 207 U. S. 463; 28 Sup. Ct. 141; 52 L. Ed. 297.

<sup>9</sup> Colasurdo v. Central R. R. of N. J. 180 Fed. 832.

The tracks upon which this work was done were not repair tracks, but were switching tracks; and the car which caused his injury was on a track upon which was run cars to be delivered to another railroad. In coupling up the air hose of the cars on this track he found one car with a defective coupler which he attempted to remedy so as to couple the cars and the air hose, but was injured while between it and the next car by some cars "kicked" on to the track which suddenly caused the defective car to move and injure him. This car was not equipped as the Safety Appliance Act required. It was held that the plaintiff was entitled to recover because this car was not equipped as the Safety Appliance Act required whereby the plaintiff was injured; and also that the Employers' Liability Act applied to him. "In moving the car in question," it was said the plaintiff "was engaged in interstate commerce," and he was employed by the company "in said commerce." "It is argued," said the court, "that the Employers' Liability Act can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see to the coupling of the car and the air hose upon the cars which were placed upon the transfer tracks. Some of the cars, among them the one in question, were engaged in interstate commerce. It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, or in the case of *Chicago Junction Railroad Company v. King*.<sup>10</sup> From a consideration of the whole case, we think the defendant or railroad company was engaged in interstate commerce; that the car in question had upon it a coupler which was defective and did not comply with the Act of Congress; that at the time plaintiff was injured the movement of the car was a movement by defendant in interstate commerce; that plaintiff was injured while a servant of defendant and in the performance of his duty, aiding in the movement of inter-

<sup>10</sup> 169 Fed. 372; 94 C. C. A. 652, affirmed 32 Sup. Ct. 79.

state commerce; that the movement of the car with the defective coupler was the proximate cause of plaintiff's injuries; that plaintiff did not assume the risk of injury incident to the employment."<sup>11</sup>

**§ 32. Laying additional track on bridge; injury by interstate train.**—A railway company was engaged in both interstate and intrastate traffic at the time its employee was injured. At the time of the injury the company was building an additional track on the line, part of which was laid on a bridge. The employee was engaged in the bridge construction, and he was injured while carrying material from one part of the work to another by a local train running between two points within the same state. This train was engaged wholly in intrastate business. It was held that he could not recover under this statute, not coming within its provisions. The court declined to follow the *Zikos* case<sup>12</sup> and the *Colasurdo* case.<sup>13</sup> The court considered that the plaintiff was "injured by an act of the defendant done in the performance of purely intrastate business," and for that reason entered judgment in favor of the defendant.<sup>14</sup>

**§ 33. Loading railroad iron rails; burden.**—Whether or not an employee injured while loading rails for an interstate railroad has not been decided. A case somewhat of this character was decided in the Supreme Court of the State of Washington, but the question whether or not such an employee came within the provisions

<sup>11</sup> *Johnson v. Great Northern Ry. Co.* 178 Fed. 643. "Whether plaintiff was guilty of any negligence which contributed to the injury was, if applicable, a question for the jury."

In the case of *Chicago Junction Ry. Co. v. King*, 169 Fed. 372, 94 C. C. A. 652, affirmed 32 Sup. Ct. 79, the person injured was a switchman employed in the

Union Stock Yards of Chicago where the injury was inflicted upon him while he was between two cars trying to replace the broken part of a coupler.

<sup>12</sup> *Zikos v. Oregon R. & N. Co.* 179 Fed. 893.

<sup>13</sup> *Colasurdo v. Central R. R. of N. J.* 180 Fed. 832.

<sup>14</sup> *Pedersen v. Delaware, L. & W. R. Co.* 184 Fed. 737.

of this statute was not decided; although, a recovery having been had upon this statute, the case was reversed because it was "not shown whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded. The respondent's theory seems to be that," continued the court, "because the appellant was authorized to, and did at times, engage in interstate commerce, and because the respondent was employed in loading a flat car with rails which had been used or were to be used in the repair of its roadbed in the State of Montana, he was necessarily engaged in interstate commerce within the meaning of the act. We can not assume that every employee of appellant, by reason of his employment, is so engaged. Appellant may have thousands of employees whose duties do not partake of that character. If the act in question is constitutional, it is so because it applies only to servants engaged in interstate commerce. If it is broad enough to include this case in its provisions, it is, in our opinion, open to the same objections which rendered the earlier act unconstitutional. If respondent is to avail himself of the benefits, the burden devolves upon him to show that the duties which he was performing while an employee of the appellant were of a character that directly pertained to and were a part of interstate commerce. No such showing was made, and appellant's motion for a directed verdict should have been sustained."<sup>15</sup>

§ 34. "While" railroad was "engaging in" interstate commerce.—Divergent views prevail over the phrase "while engaging" in interstate commerce as applied to the railroad company. Thus an employee was injured while repairing a switch in the yards of an interstate railroad by a local train running between two points within the state, and it was held that the company was liable under the statute.

<sup>15</sup> *Tamura v. Great Northern Ry.* See *Van Brimmer v. Texas & P. Ry. Co.* 58 Wash. 318; 108 Pac. 774. *Ry. Co.* 190 Fed. 394.



The repair of the switch was held to be interstate business, because the switch was used indifferently in both kinds of commerce. The court held that it was no matter of concern whether or not the train that struck him was at the time engaged in interstate commerce, giving as a reason: "It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employees. In short, if the employee was engaged in such commerce, so was the road, for the road was the master and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."<sup>16</sup> But the soundness of this position has been denied. In one case after making the above quotation, the court said: "With much respect I am unable to agree with this construction. As it seems to me, the statute does not say that the injury shall arise from the act itself done in interstate commerce; for in the light of legislative history I am unable to find a broader meaning in the words 'while engaging in commerce between any of the several states,' " etc. A carrier is not engaging in commerce between the states while it is doing intrastate business, and I think that Congress is not attempting in the Act of 1908 to regulate intrastate business by charging such business with important liabilities. For the purpose of the commerce clause, the two kinds of business are as distinct as if they were undertaken by different corporations. One corporation, the intrastate carrier, would not be subject to Federal control, and Congress would have no power to affix legal consequence to its acts. This would be clear enough, I think, if the two kinds of business were actually separated, and were actually performed by two corporations respectively. The fact that only one corporation actually performed them both makes it more difficult to separate the acts and to assign the proper consequences to each, but in my opinion cannot change the

<sup>16</sup> Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832.



rules that must be applied. It is easy to depict certain anomalies and hardships that may arise. Both are probably inevitable under the dual control exercised by the state and Federal governments over the complicated business of carriers; but this dual contract is a fundamental fact in the division of legislative power between these two governments, and the distinction must be observed. In the last analysis it appears to be a question of power. Can Congress regulate the intrastate business of a common carrier? If not, I do not see how it can declare that a purely intrastate act shall subject the carrier to liability solely because such act has injured a person who at the time was engaged in commerce between the states. Clearly Congress could not so declare if the injured person had suffered while he was engaged in business intrastate in character, and I cannot escape the conclusion that the carrier's liability must be determined by considering what kind of an act did the harm, and not exclusively by the occupation of the injured person. It is the doing, or the willing to do, some act, that gives rise to a cause of action, and it would certainly be an exceptional exercise of Federal power to attempt to give a right of action for a particular wrong unless Congress was also able to forbid the error itself. Therefore, and in this region of controversy I express my opinion with great deference for what may well be the better opinion of others—since Congress can neither directly forbid nor regulate the purely intrastate acts of a common carrier, I believe that it cannot reach the same result indirectly by deciding that important and burdensome consequences shall follow such acts.”<sup>17</sup>

<sup>17</sup> *Pedersen v. Delaware, L. & W. R. Co.*, 184 Fed. 737.

Since this case was decided the Supreme Court has decided that the Safety Appliance Act applies to the equipment of interstate cars, in a train by themselves, moved

over a railroad that is “a highway of interstate commerce.”

See Section 121a. See, also, *Southern Ry. Co. v. United States* (U. S.), 32 Sup. Ct. 2; 222 U. S. —; 56 L. Ed. —. How far this will have a bearing on the reason-

§ 35. **When an employee enters on his work or is entitled to the protection of the statute.**—A case arose in Montana that is instructive on the question when a workman is engaged in the service of a railway company and consequently when he was entitled to the protection of the Federal statute extending to interstate employees. One Moyse was a conductor on the railroad of the defendant. He brought his train to a freight yard, and having registered his arrival, in the evening of the day of his arrival, he was notified that he would not be required to go on duty again until the morning of the second day thereafter. He, with the brakeman of his train, spent the day in the city where the yard was situated, returning at night to the freight yard to sleep in the caboose, as was the fixed custom of the employees of the company. The caboose was placed on a spur track ending at an excavation, with no protection to prevent its running into it. There was a slope towards the excavation, but with the brakes set, barring accidents, it was considered reasonably safe to occupy the caboose for sleeping purposes. After the men had returned, the yard crew ran other cars upon the spur on which the caboose stood and left them standing, apparently held securely by their own brakes. During their brief absence these cars and the caboose disappeared, having been released in some manner and running together into the excavation. It was contended that the conductor who was asleep in the caboose, when it was thrust into this excavation, and who was injured, could not be regarded as, at that time, in the service of the defendant railroad, but the court held that he was, saying:

ing of the case quoted above it is difficult to say.

See, also, *Van Brimmer v. Texas & P. Ry. Co.* 190 Fed. 394.

A railroad engineer injured while hauling a train containing cars engaged in both interstate and

intrastate commerce, is himself engaged in interstate commerce, and entitled to sue, when injured, under this statute. *Horton v. Seaboard Air Line R. Co.* (N. C.) 72 S. E. 959.

“The complaint is framed upon the theory that the defendant company is liable to the plaintiff, as one of its employees, for injuries received while engaged in the discharge of his duties, through the negligence of other employees, and that the other defendants are liable because they were personally guilty of the acts of negligence which caused the injury. It declares upon the statute which abolishes the fellow-servant rule. (Rev. Codes, sec. 5251.) The acts charged as negligence are the handling of the cars by the yard crew in making up the train in such manner as to permit them to escape and collide with the caboose, driving it into the excavation, and the omission by defendants to provide some device, at the brink of the excavation, to prevent the caboose from being precipitated therein, if from any cause it escaped. The first contention made by the counsel is that the evidence is insufficient to justify the verdict, for that it appears that at the time the plaintiff was injured he was not engaged actively in the discharge of duties for which he was employed by the company, but was a mere licensee upon its property, to whom it and its employees owed no duty other than to refrain from doing him a willful or wanton injury; and hence that no liability can be predicated upon the statute. In support of this contention counsel argue that, while one is in the employ of another under a contract, he is, in a popular sense, an employee during the entire period covered by the contract; yet the rights and duties incident to the relation of master and servant, in a legal sense, do not subsist, except during the time which, under his contract, he must actively devote to the duties of his employment. To make the statement in another way: Unless the servant is at a particular time under the control of the master, giving his time and attention to the particular duties he is employed to do, he is *pro hac vice* a stranger to whom the master, as such, owes no duty whatever, except such as he must observe toward any other stranger under the social compact. While the statute has to do exclusively with those persons who sustain toward

each other the relation of master and servant, it does not undertake to define who those persons are, but merely imposes certain rights and liabilities upon them, leaving it to the courts to determine when persons have assumed the relation. The facts and circumstances which appear from the statement of the evidence before us furnish support for the inference that, during the entire time when the plaintiff was away from his home terminal, he was, except when notified that his services were not wanted, subject to be called on duty. He was required to be within call, and, as he understood the rules, was subject to discipline if he was not. It is also a fair inference that though he was not under his contract required to occupy the caboose at night, he was nevertheless expected to do so, and not only this, but that he had a right to do so, because it was under all the circumstances a substantial privilege accorded to him under the contract, which the company was not at liberty to withdraw at will. If these inferences are permissible, and we think they are, then the conclusion seems inevitable that he was in the caboose in the course of his employment, and that the members of the yard crew were his fellow-servants, for whose negligence the company is liable under the statute." "The conclusion we have reached, that the plaintiff was in the caboose for the purpose of being within call by the defendant company to go on duty, and was therefore in the discharge of his duties, involves the conclusion, also, that he was not there as a mere licensee, and that the rule of liability declared by the statute applies to the case made by the evidence. It is not at all conclusive that the pay of the plaintiff ceased when he registered on his arrival at Butte [the city where the accident happened]. In the light of the evidence, under the contract of employment it was within the contemplation of both parties that he should hold himself subject to the order of the company after his pay had ceased; and it seems clear that a contract including a stipulation of this kind, express or implied, is not open to any legal objection. Under the circumstances disclosed, the



obligation was upon the company to use ordinary care to provide a reasonably safe place for the use of plaintiff, and to maintain it in that condition."<sup>18</sup>

§ 36. **When employee enters on interstate work.**—It is very difficult to lay down any rule that will be definite enough to afford any aid in determining just when an employee begins work that is covered by the statute. This may or may not involve the question just when the relation of master and servant begins; but usually a determination of that point of time will be of assistance in this connection. Take the case of an engineer whose run is from one state to another, and who is injured by a fellow servant before he has mounted his engine or even reached it. Can the circumstances be such that he comes within the provisions of this statute? One court has in a measure answered this question. "When Tucker was killed," said the court, "he was upon the premises of the defendant in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that under such circumstances the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the Act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the inquiry of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that at the time of the injury the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when

<sup>18</sup> *Moyses v. Northern Pacific Ry. Co.* 41 Mont. 272; 108 Pac. 1062.



the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. \* \* \* In *Packet Company v. McCue*,<sup>19</sup> a bystander was hired on a wharf to assist in loading a boat which was soon to sail. This man had been occasionally employed in such work. His services occupied about two and one-half hours, when he was directed to go to 'the office,' which was on the boat, and get his pay. This he did and then attempted to go ashore. While on the gang-plank the plank was recklessly pulled from under his feet, and he was thrown against the dock, receiving injuries from which he died. Owing to the somewhat peculiar nature of the case it was held that it was for the jury to say, although the facts were undisputed, whether the relationship of master and servant existed until the man got completely ashore. The concluding sentence of the opinion of Mr. Justice Davis was as follows: 'The defense at best was a narrow one and, in our view, more technical than just.' In *Ewald v. Chicago & Northwestern Railroad Company*,<sup>20</sup> it was held that an engine wiper employed in the defendant's roundhouse, while going to his work along a pathway crossing the defendant's yard and tracks was an employee of the defendant, hence could not recover for injury resulting from the negligence of a fellow-servant on the freight train causing the injury. The court in its opinion said: 'The peculiar facts of this case which make him such, appear to involve precisely the same principles as that class of cases where the plaintiff was being carried on his way from and to his place of labor by the railroad company, by consent, custom, or contract, and was injured by the negligence of other employees of the company. This carriage of the plaintiff was the means, facility, and advantage to which he was

<sup>19</sup> 17 Wall. 508; 21 L. Ed. 705.

<sup>20</sup> 70 Wis. 420; 36 N. W. 12, 591.

entitled by reason of his being an employee or servant, which entered into and became a part of his contract of employment or were incidental and necessary to it. \* \* \* Again, it may be said that the plaintiff was still an employee, because he was attempting to use the pathway between the car as the only customary and convenient means of access to and exit from the roundhouse which the company had provided, and was under obligation to keep open and safe for him and his fellow-workmen when he was injured.' In *Boldt v. New York Central Railroad Company*,<sup>21</sup> plaintiff was injured while walking on a new track from his house to his work. The court said: 'But he was in defendant's employment and doing that which was essential to enable him to discharge his particular duty, viz., going to the spot where it was to be performed, and he was, moreover, going on the track where, except as the servant of the company, he had no right to be. He was there as the employee of the company, and because he was such employee.' But it is urged that *Fletcher v. Baltimore & Potomac Railroad Company*,<sup>22</sup> sustains the view of the defendant on this question. We do not so read the case. There the plaintiff at the time of the accident had ended his work for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have, when he was struck by the rebounding of a stick of timber thrown from a train of the defendant by one of its employees, a practice permitted by the company, and injured. It was held that 'the liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employees.' Manifestly that case and this are materially different. There the plaintiff was not on the premises of the defendant, but upon a public highway where his

<sup>21</sup> 18 N. Y. 432.

35: 42 L. Ed. 411; reversing 6

<sup>22</sup> 168 U. S. 135; 18 Sup. Ct. App. D. C. 385.

relations to the defendant were precisely those of the general public to it. Its relation to him, therefore, in such a situation was precisely what it would have been to any other pedestrian. Here, however, the plaintiff was upon the premises of the defendant, upon its invitation, in the line of his employment, and solely because of such employment. We hold, therefore, that at the time of his death, Tucker was within the protection of said [Federal] Act.”<sup>23</sup> But where a fireman whose run was wholly within the state, having oiled and prepared his locomotive, which was not then attached to a train of cars, was killed while crossing the tracks to his boarding-house for a personal purpose; and his locomotive was to have hauled some interstate freight, but the road upon which it was run was not an interstate carrier, though the lessee was engaged in such commerce, it was held that the Federal statute did not apply to him, because at the time of his injury he was not engaged in interstate commerce.<sup>23\*</sup>

**§ 37. Injured servant employed in both interstate and intrastate commerce.**—Few servants of an interstate railroad are employed wholly in intrastate commerce, and so few are employed wholly in interstate commerce. The fact is that all servants connected with the traffic operations of such a railroad are engaged both in inter and intrastate commerce during their employment. If such a servant be injured while engaged in intrastate commerce, then he cannot invoke the aid of this statute to enable him to recover damages; but if he be injured while engaged in interstate com-

<sup>23</sup> Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123.

<sup>23\*</sup> Zachary v. North Carolina R. Co. (N. C.) 72 S. E. 858. “If the contention of the defendant [plaintiff] can be maintained, then it follows that all employees of railways that do an interstate business are necessarily employed in interstate commerce. The ticket seller,

who sells a ticket to a traveler going beyond the state, the car cleaner who cleans the car he is to travel in, the man who loads the engine tender with coal which is to pull him, and the gate keeper who examines his ticket and passes him into the car, are all employed in interstate commerce.”

merce, he may. The fact that he is sometimes engaged in intrastate commerce in no way prevents his resorting to the statute when injured while engaged in interstate commerce. "The distinction should be noted that the act will not necessarily apply to the same persons in all details of his employment. One man might have duties including both interstate and intrastate commerce, and he would not be subject to the act while engaged in one and not the other."<sup>24</sup> "Any" employee "while" engaged in interstate commerce is embraced within the terms of the statute. He can invoke the statute for an injury received "while" he is engaged in interstate commerce. It is not enough for him to show that he was engaged generally by an interstate railroad company.<sup>25</sup> He must go further and show that he received his injury "while" engaged in interstate commerce for the company. Thus an engineer hauling an intrastate train loaded entirely with intrastate traffic is not within the terms of the statute if he be injured, for he is not injured "while" engaged in interstate commerce, though he would be if there was any interstate traffic aboard the train. In one case the plaintiff was a brakeman on a train loaded both with interstate and intrastate traffic. The train as such was made up to run from one point within a state to another within it. On reaching a station midway a car loaded wholly with intrastate commerce was to be left. That part of the train back of it was cut loose; and it was then hauled up the track past a switch and then that part of the train in front of it was backed rapidly so as to make a "running switch." In so doing he fell off the rapidly moving car and was injured. It was held that he was injured while engaged in intrastate commerce and not interstate commerce.<sup>25\*</sup>

<sup>24</sup> Colasurdo v. Central R. R. of N. J. 180 Fed. 832; Zikos v. Oregon R. & N. Co. 179 Fed. 893; Horton v. Seaboard Air Line R. Co. (N. C.) 72 S. E. 958.

<sup>25</sup> Tsmura v. Great Northern Ry. Co. 58 Wash. 316; 108 Pac. 774.

<sup>25</sup> Van Brimmer v. Texas & P. Ry. Co. 190 Fed. 394.

The statute applies to the em-



§ 38. **Employees covered by statute.**—It is beyond debate that the statute embraces all engineers, firemen, brakemen and conductors employed at the time of their injuries upon an interstate train. In one case it is said that the statute covers a telegraph operator dispatching trains,<sup>26</sup> and in that same case it is said that Congress meant to include everybody whom it could include. As we have seen, it has been held that a section hand or track repairer on an interstate railroad track, or over which interstate traffic passes, is embraced within the statute,<sup>27</sup> although that decision has been declared unsound.<sup>28</sup> It includes a car repairer in a switching yard repairing interstate cars.<sup>29</sup> Since cars upon the terminal tracks of interstate railroads are regarded as within the Safety Appliance Act of 1893, it is a legitimate conclusion that all employees handling therein cars upon such tracks used as interstate cars are embraced by this statute of 1908.<sup>30</sup> No doubt, it is believed, but what a freight handler of interstate freight in loading and unloading cars in which it is to be or has been carried is covered by the terms of the statute. So are mechanics or repairmen, while engaged upon interstate cars, engines or other interstate instrumentalities, and even while passing over the railroad for the purpose of repairing such cars, engines or instrumentalities. Likewise the members of an emergency crew while at work upon any interstate train or any railroad track that is a highway of interstate commerce. Linemen fall within its terms. Not only are track repairers within its terms, but also those who construct or repair the signal wires used by an interstate railroad, even though they be used without discrimination between the

employees of a railroad company employed on a ferry boat, owned and operated by the company in interstate commerce in connection with its railroad, and supersedes a state statute on the subject. *The Passaic*, 190 Fed. 644.

<sup>26</sup> *Colasurdo v. Central R. R. of*

*New Jersey*, 180 Fed. 832.

<sup>27</sup> See. 29 and Sec. 30.

<sup>28</sup> See. 32.

<sup>29</sup> See. 31.

<sup>30</sup> See *Johnson v. Great Northern Ry. Co.* 178 Fed. 643; *Chicago Junction Ry. Co. v. King*, 169 Fed. 372.



local or interstate character of its traffic. Courts have not yet gone so far as to hold that engine wipers in round-houses or shops injured while wiping such engines, are engaged in interstate commerce, although the engine is habitually used in hauling interstate traffic. Nor have they passed upon the question of a mechanic repairing such an engine in a roundhouse or in a shop; or a carpenter in repairing a car. Perhaps it may be said that such an engine or car for the time being has been withdrawn from interstate commerce, and therefore an employee repairing them is not engaged in such commerce. But in the instance of repairs to an engine at the end of its route, while in a roundhouse, which do not prevent it from being taken on its next appointed trip, it is very difficult, if impossible, to say that it has been withdrawn from interstate commerce. And this might be true of a car loaded with interstate traffic removed to a shop for repairs where its delay is only for a short period, or possibly for a long period. In the case of yardmen engaged in making up an interstate train, under the liberal construction given these Federal statutes by the courts, there is no doubt but what they will be held within the terms of this Employers' Liability Act. In the case of clerks in the accounting department, although they be engaged in keeping the accounts of interstate shipments, it is difficult to see how they are engaged in interstate commerce as used in this statute; for their work is not of a hazardous character, such as it seems that Congress had in mind when it enacted this statute. And this is also true of ticket sellers; but not station agents when handling interstate traffic.

**§ 39. Relation between the employment and the accident.**

—The statute expressly limits the right of recovery to a "person suffering injury while he is employed by such carrier in such commerce," namely, in interstate commerce in the states or general commerce in the territories. If the injury arises from a cause in no manner connected with or arising

out of his employment, then he cannot recover damages under this statute. This is emphasized, as it were, by the title of the Act, which is "An Act relating to the liability of common carriers by railroads to their employees in *certain cases*." The accident must occur or the injury be received from a cause which arises out of or is incidental to railway employment. As was said in an English case, on an analogous question, there must be "some casual relation between the employment and the accident."<sup>31</sup> Thus where a workman A maliciously threw a piece of iron at workman B, which struck the eye of workman C who was at work, it was decided that a workman who was injured through the tortious act of a fellow-workman, which had no relation whatever to their employment, had no claim against his employer, on the ground that the injury did not arise out of the employment. "It seems to me," said the court, "that in such a case the accident would not arise 'out of or in the course of the employment.' It would not be an accident of the employment at all. It would be entirely outside the scope of the employment of the doer of the act and of the injured workman. \* \* \* It seems to me, as a matter of law, that we cannot say that the injury caused by a missile thrown by another workman entirely outside the scope of his employment was caused by an accident which arose out of his employment."<sup>32</sup> "The test," said an American judge, "of the employer's liability is not the fact that the negligent act of the servant was during the existence of his employment; nor is the fact that his act was done during the time he was doing some act for his employer. But the test is: was the act causing the injury done in the prosecution of the master's business?"<sup>32a</sup> In

<sup>31</sup> O'Brien v. Star Line Limited, 1 Butterworth's Workmen's Compensation Cases, 177, 181.

<sup>32</sup> Armitage v. Lancashire & G. Ng. Co. 4 Minton-Senhose Workmen's Compensation Cases, 5.

<sup>32a</sup> Jackson v. Chicago, R. I. & P. Ry. Co. 173 Fed. 432, citing

Chicago v. Barker, 131 Fed. 161; Bowen v. Illinois Central R. Co. 136 Fed. 306; St. Louis S. W. Ry. Co. v. Harvey, 144 Fed. 806; Morier v. St. Paul, M. & M. R. Co. 31 Minn. 351; 17 N. W. 952, and Hudson v. Missouri, K. & T. R. Co. 16 Kan. 470.

another English case it was said: "But where the servant, instead of doing that which he was employed to do, does something which he was not employed to do at all, the master cannot be said to do it by his servant,"<sup>33</sup> and in another case, "but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."<sup>34</sup>

**§ 40. Who must inflict injury to render railway company liable.**—In the first section of the statute the railway company is rendered liable only where the injury or the death results in whole or in part from "the negligence of any of the officers, agents, or employees" of the carrier company. This aside from defective or insufficient appliances, cars, engines, machinery, track, roadbed, works, boats, wharves, or other equipment. It necessarily follows where the injury is inflicted by one of the persons enumerated that the negligence to be actionable must be that of such persons in the capacity of officers, agents, or employees as such. This negligence must be incidental and relate to the company's business—having some natural relation to the employment or to its business. If the injury or death is received from a cause entirely disconnected from the employment, or at a time and place disconnected from it, there is no liability on the part of the company.

**§ 41. Interstate employee injured by negligence of intrastate employee.**—The statute wipes out the rule of fellow-servant. Then, if an employee is injured while engaged in interstate commerce by the negligent act of an intra-

<sup>33</sup> Mitchell v. Crassweller, 13 C. B. 235.

<sup>34</sup> Joel v. Morrison, 6 C. & P. 501.

state commerce servant, can he recover? Unquestionably he can. The test is, "was the servant injured while engaged in interstate commerce by the negligence of his employer?" If he was, he may recover, and it matters not that the servant inflicting the injury was engaged only in intrastate commerce. It would be just as logical to claim that the company was not liable because he was injured by an instrument not used in interstate commerce, for which no one would seriously contend. Such an instance would be where an employe is injured by the collision of his train with an intrastate train. A rule that there could be no recovery in such instances would to a great extent nullify the usefulness and object of the statute. Whenever it is a necessary incident to the regulation of interstate commerce, Congress can control, to that extent, intrastate commerce. Unquestionably Congress can, if necessary to protect interstate employes, treat interstate employes simply as employes of the company and impute their negligence to the company. Nor can it be claimed that the act is void because it invades, on this point, the police power of the state and because the United States has no police power; for, although the police power of the state is ostensibly exclusive to it, and the Federal Government has no police power in itself, yet Congress may, under the constitution, pass all laws which are essential to make effective the powers belonging to it. If it, therefore, becomes essential for Congress to exercise powers that invade police regulations of a state, for the purpose of making effective its powers, it may do so.<sup>35</sup> "The effect of the statute is to abolish, to the limited extent indicated [therein], the common law doctrine which forbade the recovery of damages for injuries to employees sustained by the negligence of fellow-servants. The act also, in other provisions not under

<sup>35</sup> *Watson v. St. Louis, I. M. & S. Ry. Co.* 169 Fed. 942; affirmed 32 Sup. Ct.—

In *Zikos v. Oregon R. & N. Co.* 179 Fed. 893, there is an intimation that the injury must be in-

flicted by an interstate employee, although that was a mere expression not amounting even to a dictum.



consideration here, modifies the rule of contributory negligence and the doctrine of assumption of risk.

“It is the relation only between the carrier and the employee who is injured while he is engaged in interstate or foreign commerce that is regulated by the imposition of the liability mentioned. The fallacy of the contention that the act seeks to regulate the relations between the carrier and its employees who are not engaged in interstate commerce, is shown by the fact that no change whatever is made by the statute in their relations, no liability being imposed upon the carrier for injuries suffered by an employee when not engaged in interstate commerce by reason of the negligence of a fellow-servant.

“It is manifest that the primary object of the statute in question was not simply to give a right of action where none before had existed, but, by imposing a liability upon the carrier for injury suffered by an employee while engaged in interstate commerce through the negligence of a fellow-servant, or by reason of any defect due to its negligence in its cars, engines, appliances, etc., to insure a greater degree of care on the part of the carrier for the protection of the employee while engaged in interstate or foreign commerce, and of the persons and property whose safety might be dependent upon the safety of such employee. The statute is founded on a different view as to the requirements of public policy in respect to matters of this kind from that anciently entertained by the courts who formulated the common law doctrine. In this aspect of the case, it is immaterial what may be the nature of the agency, whether animate or inanimate, that causes such injury, provided it may be something for the negligent conduct or existence of which the carrier may properly be made responsible.

“Take the subject of inanimate things, for instance. Suppose a railroad company engaged in interstate commerce so negligently constructs a bridge across its road that an employee while engaged in such commerce is injured



thereby, the bridge being used for the convenience of local traffic only. Will it be said that Congress could not impose a liability upon the railroad company for its negligence in that regard, and that if it did so it would be regulating intrastate commerce? What difference in principle is there between the case suggested and that of a railroad engaged in interstate commerce which, through the negligence of its officers, agents and employees, so negligently runs a local train upon its interstate lines as to injure an employee upon an interstate train while he is engaged in such commerce? In applying the rule of *respondet superior* to such cases Congress has only undertaken to impose a liability upon the carrier to the extent necessary for the proper protection of interstate commerce.

“If Congress cannot make the carrier liable for injuries suffered by an employee while he is employed in interstate commerce, caused by the negligence of any of the other employees of the carrier, irrespective of the nature of the business in which the latter may at the time be employed, manifestly it cannot protect such employee, and through him the interstate commerce in which he is employed, against a very large percentage of the injuries which are likely to occur to him and for which the carrier should properly be held responsible.

“It is further to be observed that, although the agency of the carrier, animate or inanimate, which may occasion injury to an employee while he is engaged in interstate commerce, may not itself be engaged or employed in such commerce, yet, necessarily, in order to come within the scope of the act, it enters the domain of interstate commerce, else no injury would be suffered by the employee engaged in such commerce. In other words, in every such case the master, through his agents, negligently, and hence unlawfully, allows an obstruction to be placed in the way of the safe conduct of interstate commerce, by which the employee engaged therein is injured.

"It is suggestive of the weakness of the present contention that no such objection was ever made with regard to the original act in the Employers' Liability Cases. In fact, it was practically conceded in those cases that if the statute could be construed to limit the liability of the carrier to its employees when or while such employee was engaged in interstate commerce it would be constitutional, so far as any objection of this kind was concerned. In the present statute Congress has imposed that limitation. The act does not undertake to regulate the relations between the carrier and its employees who are not engaged in interstate commerce. The relations between the carrier and such employees remain precisely the same as if the statute had not been passed. No relief whatever is afforded them by the act. They only enter into consideration, as the agents of the carrier, in determining the liability between the carrier and its employees who suffer injury while employed in interstate commerce.

"As stated, the fallacy of the contention that the act is unconstitutional lies in the assumption that the Congress has in some way regulated the relationship between the carrier and its employees who are not engaged in interstate commerce at the time of an injury coming within the terms of the act. If the relations between the carrier and such employees are changed in the slightest degree by the act, it should be a simple matter to point out the change. If they are not changed, the contention made is untenable.

"It is true the act imposes a liability upon the carrier for the negligence of its employees who may not be employed at the time in interstate commerce. But the liability imposed is to its employees who suffer injury by reason of such negligence at a time when they are employed in interstate commerce. No duty, no liability, no responsibility is imposed upon the carrier with respect to its employees who may occasion such injury.

"It seems unnecessary to carry this discussion further. If Congress cannot protect an employee while he is en-

gaged in interstate commerce from the negligence of the railroad carrier to the extent provided in this act, it is shorn of the plenary power to regulate commerce that has been so often asserted.”<sup>36</sup>

§ 42. *The Nebraska statute.*—Some little light may be thrown upon this point by a decision of the Supreme Court of Nebraska in construing a statute of that state. An employee of a railroad company was a helper in a blacksmith-shop of the company, and at the time of his injury was assisting in flattening iron washers at a steam hammer. He charged that his injuries were caused by the carelessness of the employee operating this hammer. These washers were used for repairs to cars and engines. The action was brought upon a statute of the state which provided “that every railway company operating a railway engine, car, or train in the state of Nebraska shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car, or train for said company.” The railroad company contended that the employee plaintiff was not within the class protected by the statute, because he was not injured through a risk or hazard incident and peculiar to the business of constructing, repairing and operating railroads; but the court pointed out the clause “or in the use and operation of any engine, car or train for said company,” as applicable to the case and covering it, saying:

“It is clear from this wording of the statute that the legislature intended that the fellow-servant rule (not law) should not apply to any of the employees of any railroad in the state who were either engaged in the operation of engines, cars, or trains, or were engaged in construction or repair work. Substantially the same reason sustains the entire classification; that is to say, there are dangers inherent in and peculiar to all the vocations described in the

<sup>36</sup> Quotation from brief of the Attorney-General of the United

States in *Watson v. St. Louis, I. M. & So. Ry. Co.* 169 Fed. 942, affirmed 32 Sup. Ct.—

statute, which are rarely, if ever, encountered by employees working for a master not engaged in the operation of a railway. The legislature well knew that substantially all railway construction or repair work is dangerous, performed either in the immediate vicinity of tracks upon which trains are passing or by the use of dangerous machinery, as in the case at bar. Classifications should receive a practical construction, and we are of opinion that a reasonable application of the law to the facts in the case before us not only brings the plaintiff within its purview, but forbids a holding that the law itself is obnoxious to the Constitution of the United States or to the Constitution of the state of Nebraska. We must not be understood as deciding that all work of construction or repair of any article or structure performed in the service of a railroad company comes within the purview of the statute. The work of a railroad company is divided into many departments. The duties and hazards of employees in one department may be as dissimilar from those in other departments as are those of a clerk or bookkeeper in the uptown headquarters from those of an engineer or brakeman on a train; and questions may hereafter arise as to the scope of the act under consideration, which we do not now decide. But, where the work of construction or repair is as closely connected with the actual operation and use of the railroad as the work of the present plaintiff, it seems clear that it is within the class of hazards covered by the act.”<sup>37</sup>

**§ 43. Validity of statute allowing a recovery for an injury occasioned by an intrastate employee.**—The validity of this Act has been vigorously attacked in so far as it allows a recovery for an injury inflicted upon an interstate employee by the negligent act of an intrastate employee, but so far without avail. “As the powers of Congress,” said Justice Tricheb, “are limited to those granted by the

<sup>37</sup> Swoboda v. Union Pacific R. Co. 87 Neb. 200; 127 N. W. 215.



Constitution, and the only provisions of that instrument authorizing such legislation is the commerce clause, and that is limited to 'commerce with foreign nations and among the several states and Indian tribes,' it can, of course, only legislate for the safety of those employed in those branches of commerce, and not in intrastate carriage. That is all the act under consideration attempts to do. It is limited to those who are in the employment of railroads engaged in commerce between the state, and while they are actually engaged in such employment. What difference does it make what the employment of the fellow-servant is—whether interstate or intrastate? The safety of the employees of an interstate train, as well as of the passengers entrusted to their care, can in no wise be affected by that. Congress having the exclusive power to regulate interstate commerce, that power necessarily includes the right to regulate the relation of master and servant operating such trains and legislate for the safety of the employees.<sup>38</sup> If the contention of defendant is sustained, the effect would be that although the employee of a carrier by rail engaged in interstate transportation is injured while engaged on an interstate train, if the cause of the injury was the negligence of a fellow-servant not engaged at the time in interstate work, Congress is powerless to provide for a recovery of compensation for the injuries suffered. Therefore, if an engineer or fireman on an interstate train is injured by reason of the negligence of a switchman or other employee of a train operated on a branch line, which is used exclusively for intrastate business, the failure of Congress to except such accidents from the provisions of the statute makes it unconstitutional as being in excess of its powers under the Constitution. The same result would follow if a telegraph operator on such a branch line fails to transmit

<sup>38</sup> Citing *Johnson v. Southern Co.* 205 U. S. 1; 27 Sup. Ct. 407; *Pacific Ry. Co.* 196 U. S. 1; 25 51 L. Ed. 681; and *Employers' Liability Cases*, 207 U. S. 498; 28 Sup. Ct. 138; 49 L. Ed. 363; *Schlemmer v. Buffalo, etc., Ry.* Sup. Ct. 145; 52 L. Ed. 297.



or deliver a message from the train dispatcher directing the conductor of the interstate train to go on a siding for the purpose of letting an intrastate train pass on the main line, and by reason of such negligence there is a collision. In *State v. Chicago, Milwaukee & St. Paul R. Co.*,<sup>39</sup> the court, speaking of a similar question, said: 'The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also an ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded if, under the direction of a separate employee, a local train may be moving between Milwaukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously division of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or vice versa. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental that no legislature would absolutely precipitate it without careful consideration, nor without providing in the act for the event of failure of such experiments.' There is nothing in the Employers' Liability Cases to warrant the construction claimed on behalf of de-

<sup>39</sup> 136 Wis. 407; 117 N. W. 686.

fendant. What the court did decide in that case was that as the act under consideration included all employees of an interstate carrier, even if they (the employees) were engaged in an employment wholly disconnected from the interstate business, citing 'employees of a purely local branch operated wholly within a state, employees in repair shops, construction work, accounting and clerical work, storage elevators and warehouses, not to suggest, besides, the possibility of it being engaged in other independent enterprise,' and then held that: 'As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution.' No doubt Congress, had it seen proper to do so, could have limited it to certain fellow-servants, such as are employed only in interstate service or in the same or different departments of the common employment, as has been done by some of the states. See acts of Arkansas, Indiana, Massachusetts, Mississippi, Missouri, Montana, Ohio, Oregon, South Carolina, Texas, Utah, and Virginia. But the failure to do so cannot invalidate the act."

The court then reviews many cases under like statutes and concludes that "the act in controversy is a valid exercise of the power granted to Congress by the Constitution." 40

40 *Watson v. St. Louis, I. M. & S. Ry. Co.* 169 Fed. 942; affirmed 32 Sup. Ct.—

In this the court makes the following quotation from the opinion of Justice White in the *Employers' Liability Cases*, 207 U. S. 498; 28 Sup. Ct. 145; 52 L. Ed. 297, and says that the italicized portion does not appear in the opinion. It certainly appears in the official report of the opinion. The court examined the record of the case in which this opinion was rendered and held that the words in italics was a mere obiter dictum,

no such a proposition as therein laid down having been argued in the briefs:

"Thus, the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces: that is, it is in favor of any of the employees of all carriers who engaged in interstate commerce. *This also is the rule as to the one who otherwise would be*

*a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from negligence of any of its officers, agents or employees.'"*

The validity of this act in this particular respect has been practically upheld in *Zikos v. Oregon R. & N. Co.* 179 Fed. 893.

"No doubt is suggested that the requirement of safety appliances on cars that are actually laden with interstate traffic is a regulation of interstate commerce. Now, if the same interstate carrier may haul on the same interstate highway, cars that need not be equipped because, though regularly used in interstate traffic, they are empty at the time (*Wabash Ry. Company*), and also cars that need not be equipped because they are laden with intrastate traffic exclusively (*Elgin R. Company*), the purpose of equipping the cars that are carrying interstate traffic would manifestly be largely impaired or destroyed, for in switching movements, in derailments, and in collisions, disasters would come to the interstate car quite irrespective of the character of the other cars involved. Therefore, Congress, under the power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers of regulating interstate commerce, had the right to make the laws in question; and they are paramount, of course, to all laws of the state. This result, which we deem sound in reason, is indirectly sustained, we believe, by the *Employers' Liability Cases*, for there the statute was overthrown only because an inseparable part of it was found to have no

necessary relation to the security of interstate transportation." *Wabash R. Co. v. United States*, 168 Fed. 1.

"Is the act in excess of the power of Congress in that it regulates such relation as to intrastate employees by making the carrier liable for their negligence to interstate employees?"

Having determined that the regulation of the relation of master and servant as between an interstate carrier and its interstate employee is a regulation of commerce, we must answer the question as to whether or not the rule established by the act goes beyond the power of Congress in that it regulates such relation as to intrastate employees by making the carrier liable for their negligence to interstate employees.

This act, properly construed, includes injuries suffered by a servant while he is employed in interstate commerce through the negligence of *any* of the officers, agents, or employees of the carrier, whether or not the latter were employed in such commerce.

All that the act does in this particular is to regulate the relation of a common carrier engaged in interstate commerce to its employee while engaged in such commerce. In order to protect the interstate employee it imposes a liability on the interstate carrier.

It abolishes the common law doctrine which forbade the recovery of damages for injuries to employees sustained by the negligence of fellow servants. This it does only as to employees engaged in interstate commerce. No change is made with respect to the rights of an intrastate employee or the duties of a carrier to such servant. It is submitted that under the commerce clause, wherever it is a

necessary incident to regulation of interstate commerce, Congress can control intrastate commerce.

There is only one sovereign power over interstate commerce—the power of Federal government.

In the exercise of this sovereign power, to regulate interstate commerce, Congress is absolutely untrammelled by any rights of the states, or by any rights of corporations derived from states. Anything conflicting with the Federal sovereignty over interstate commerce must give way to the ample and conclusive power over this subject conferred upon the national government. No authority derived from the states can be permitted to conflict with the Federal power. When Congress acts upon any subject relating to interstate commerce, all state regulation of the same subject is suspended. This is true to the same extent that state insolvency laws are suspended while a national bankruptcy act is in force.

It will be conceded that the Federal power is ample in bankruptcy cases to affect purely local transactions of merchants, where the rights of creditors generally may be affected. Where such rights of general creditors are involved the Federal power assumes the adjustment of relations arising out of rights otherwise controlled exclusively by local law.

The same is true when rights otherwise exclusively local come into conflict with rights founded on Federal laws regulating interstate commerce. In such cases it is essential that such local rights be regulated in order that interstate regulation may be made reasonably effective. Inherent in the Federal sovereignty over the whole subject of interstate commerce, and essential to its maintenance, is the

power to make any incidental regulation of commerce within the states, in cases in which such intrastate regulation is necessary to the complete, uniform, and orderly regulation of interstate commerce.

This Federal power to regulate local affairs exists, however, only when incidental and only so far as reasonably necessary to the regulation of interstate commerce. This power, it must be understood, does not extend to the regulation of intrastate commerce, as such, but merely to such intrastate commerce as is so intimately related to interstate commerce, or so commingled with it, that the latter cannot be regulated without affecting the former. Intrastate commerce may be affected by Federal laws relating to interstate commerce where the latter power could not be reasonably and effectively exercised without so affecting the domestic power of the state.

In protecting interstate employees, Congress can fix upon a carrier liability for the negligence of any of its servants. Such negligence then becomes the negligence of the carrier, and it is immaterial whether the employee causing such injury is engaged in intrastate or interstate commerce. His negligence is imputed to the company.

If Congress has the power to create certain rights in favor of interstate employees, it can by appropriate legislation make those rights effective. It may if necessary invade the police power of the state.

Although it is often said that the Federal government has no police power in itself, yet Congress may exercise police regulation for the purpose of effecting powers that belong to it. If in regulating



commerce it becomes necessary to pass a law similar to one passed by a state under its police powers, Congress may do so.

In regulating this relation between the interstate employee and his employer, it is immaterial whether the injury is caused by a defective machine, another interstate employee, or an intrastate workman. The liability is from the interstate employer to the interstate employee. Congress may so far as the question of power is concerned ignore the cause of the injury.

Power over railroads is identical with power over maritime commerce. The latter power has been held to extend to a law limiting the liability of ship owners. The power to limit is no greater than the power to extend. If Congress may, therefore, increase the liability of ship owners for the perils of the sea, why may not legislation be just as constitutionally enacted extending the liability of railroads for similarly hazardous perils?

The imposition of this liability upon a carrier has a direct tendency to promote greater care and diligence on the part of the carrier in complying with statutory as well as the common law obligations for safety. The expression of Judge Taft in *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* (96 Fed. 298, 300), is in point. He said, speaking of a statute of Ohio requiring railroad companies to block the frogs, switches, and guard rails on their tracks, under penalty of a fine (our italics):  
 “\* \* \* The expression of one mode of enforcing it did not exclude the operation of another, and in many respects *more efficacious*, means of *compelling compliance* with its terms, to-wit, the right

of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. \* \* \*.”

Congress has here thrown the cloak of protection over interstate employees. It has given to those employees certain rights not possessed by others not so employed. It affords this protection that they may be more diligent in transacting the business committed to them; that their duties may be performed more thoroughly and commerce thereby made more safe.

It is the man that is protected in order that commerce may be protected. This man is the agent by which commerce is transported. And commerce is by this legislation regulated.

It matters not whether the cause of the injury was animate or inanimate, provided it be of a nature for which the carrier may fairly be made responsible. Can it be said that Congress has the power to make the carrier liable for a defective track, bridge, or car and yet not for its animate agent? To state the proposition is only to demonstrate its unsoundness. Congress has said that if the master allows any agency which enters the domain of interstate commerce to become an obstacle to the safety of interstate employees, he cannot plead as a defense the fellow servant doctrine.

While a servant of an interstate road is about his master's business and engaged in interstate commerce, he is entitled to and within the protection of the congressional power. This power reaches out to him in his every act while performing his duty to his employer in the line of interstate commerce, and Congress has placed upon the



railroad the obligation to protect him while so engaged. If he is injured by the railroad, by any of its agents or instrumentalities while in the performance of interstate duty, that injury is the act of his interstate employer, for which such employer may, according to every principle of legal responsibility, be made answerable. The injury to him constitutes an interference with interstate commerce, and Congress has the power to fix the liability of the carrier therefor.

If an act of an intrastate servant is so directly connected with interstate commerce that it injures one who is engaged in interstate commerce, the relation of the intrastate servant to interstate commerce is so proximate as to bring such act within the power of Congress upon the subject.

If the servant of an interstate railroad, though engaged in intrastate commerce, comes into such intimate relation with interstate commerce that his negligence causes injury to a servant of the same master, who was actually engaged at the time in interstate commerce, his connection with interstate commerce is fixed by this act, and the power of Congress attaches and is enforced by this statute in favor of the employee who meets with such injury.

There can be no objection to the application by Congress of the rule of *respondent superior* in making an interstate railroad liable to the interstate servant for an injury caused by a local servant.

The power which regulates interstate traffic extends to the fixing of the liability of the carrier to the men who move such traffic. If the power exists in Congress to regulate the obligations of the carrier for damage to interstate

freight, it ought not to be minimized in affording a remedy for injury to men engaged in moving interstate traffic.

Any employee engaged in connection with interstate commerce is subject to Federal control. His duties may be prescribed. His qualifications may be fixed. His liabilities and those of his master may be determined by Congress.

That is all that is sought to be accomplished by this act.

When a railroad is engaged in interstate traffic its employees are subject to Federal control, and such regulation is necessary. This is obvious when the facts as to operation of interstate railroads are carefully examined.

Interstate railroads are run as a unit. All the departments and divisions of such railroads are closely correlated and intermingled, and it would be unwise for the court to assume a segregation where, in fact, none exists. It would be a matter of extreme difficulty in an interstate railroad to point out any distinct line of demarcation between interstate and intrastate business. The financial affairs of the road are managed as a whole. The direction and control of trains are under one head. The general orders covering all operations of the road come from the same general manager. Particular orders as to the dispatch of trains originate with interstate train dispatchers. The same engines, cars, and other instrumentalities are indiscriminately used in interstate and intrastate business. The same tracks are used for both interstate and intrastate traffic. The most distinctively local branches have physical connection with the interstate tracks, and foreign cars, loaded with interstate traffic, and trains of the

road itself containing cars loaded in whole or in part with interstate traffic, pass indiscriminately over these local divisions.

At the ticket offices of every local branch of such a railroad tickets are sold over the entire interstate railroad, and also over extra-state connecting lines. Inasmuch as interstate passengers are thus solicited and afterwards carried over such seemingly local branches, all engaged in their transportation, and all co-operating in the maintenance of the track for their transportation, are engaged in interstate commerce.

Every local freight station on the line receives and transmits freight for all other stations on the line, and for points beyond the state, and thus all who co-operate in any of the work of the receipt or transmission of such freight are engaged in interstate commerce. All who participate in the maintenance of the instrumentalities for the general use of the road, even in the maintenance of such instrumentalities as are used on purely local branches, necessarily participate in the work of interstate commerce, because interstate commerce is carried on

over every part, branch, section, and division of the entire system of such interstate road.

This intermingling of both kinds of traffic makes necessary the adoption of some uniform system of regulation, and the Supreme Court of the United States has repeatedly held that subjects of the commerce power which are in their nature national or admit only of one uniform system of regulation are exclusively within the legislative power of Congress. *Cooley v. The Board of Wardens, etc.*, 12 How. 299, 319; 13 L. Ed. 996; *Case of the State Freight Tax*, 15 Wall. 232, 279; 21 L. Ed. 146; reversing 62 Pa. 286; 1 Am. Rep. 399; *Welton v. The State of Missouri*, 91 U. S. 275, 280; 23 L. Ed. 347; reversing 55 Mo. 288; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 210; 5 Sup. Ct. 423; 28 L. Ed. 959; affirming 19 Fed. 562; 9 Sawy. 662; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 492; 7 Sup. Ct. 592; 30 L. Ed. 694; reversing 13 L. Ed. 303. (From brief of the Attorney-General of the United States in *Central of Georgia Ry. Co. v. Waldo*, 6 Ga. App. 840; 65 S. E. 1098.

## CHAPTER V.

### CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

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45. Assumption of risk—Statute.
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- 94. Presenting the defense of contributory negligence—Burden.
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§ 44. **Contributory negligence—Statute.**—Section 3, of the statute provides as follows: "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided*, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."<sup>1</sup>

<sup>1</sup> Section 3 of statute. Sections 3 and 4 fall within a class of legislation finding its authority in the exercise of a reasonable police power by the legislature in regu-

lating the relations of master and servant. It is pretty well conceded that those sections are constitutional. *Kelly v. Great Northern Ry. Co.* 152 Fed. 211.

§ 45. **Assumption of risk—Statute.**—"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of the employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."<sup>2</sup>

§ 46. **Exceptions—Statute.**—"That nothing of this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled 'An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employes,' approved June 11, 1906."<sup>3</sup>

§ 47. **To what "statute" reference is made.**—The "statute" referred to in the two preceding sections is a statute of the United States and not a statute of a state or an ordinance of a municipality. To construe the word "statute" to mean a state statute would render the Employers' Liability Act of uneven effect throughout the United States and perhaps render it obnoxious to the Fifth Amendment of the Constitution, and also, no doubt in many instances extending the power of Congress over interstate commerce to cases not falling within the scope of interstate commerce. But this does not dispose of the railway company's liability to an employe where his injuries were occasioned by the company's violation of a valid state stat-

<sup>2</sup> Section 4 of statute. "Clearly had Section 1 [of the Act of 1906] in terms provided that carriers should install and maintain proper and sufficient cars, etc., and that the failure to do so would render it liable for accidents resulting from such failure and deprive it of the defense of contributory negligence, the carrier would not be permitted to defeat the law by resorting to the doctrine of as-

sumption of risk." *Philadelphia B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, citing *Kilpatrick v. Grand Trunk Ry. Co.* 72 Vt. 288; 47 Atl. 827.

<sup>3</sup> Section 8 of the statute. The last statute referred to is the one that was declared unconstitutional in *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462.



ute. As for instance, the failure of a locomotive engineer to give the required state statutory signals at a railway or highway crossing whereby a collision with another train or a traveler is occasioned, the train derailed and an employe on the train is injured. Other instances might possibly be suggested. In such an instance, no doubt, the state statute could be pleaded to show the statutory negligence of the railway company and thus give the employe a cause of action which possibly he might not otherwise have had.<sup>3\*</sup>

**§ 48. Contributory negligence as a defense.**—A careful reading of this section will show that contributory negligence is no longer a complete defense as it was at the common law, but is still a partial defense. As a complete defense all the rules of the common law are erased at one sweep of the legislative pen; and although an employe is guilty of contributory negligence he may still recover. But those rules are still in force for the purpose of determining the quantum of damages the employe may recover; for whatever at common law was contributory negligence is still to be considered in determining the relative amount of the employe's negligence as compared with that of the employer.<sup>4</sup>

<sup>3\*</sup> This is the logical conclusion of the Howard case, cited herein as the Employers' Liability cases, 207 U. S. 463; 28 Sup. Ct. Rep. 143, affirming 148 Fed. Rep. 997. Some little analogy can be drawn from the case of *Wayman v. Southard*, 10 Wheat. 1, holding that the Kentucky law of executions, passed subsequent to the Federal Process Act, were not applicable to executions which issued on judgments rendered by Federal courts. See also *Mutual Life Ins. Co. v. Prewitt*, 31 Ky. L. Rep. 1319; 105 S. W. Rep. 463.

That the word 'statute' does not include municipal ordinance,

see *Rutherford v. Swink*, 96 Tenn. 546; 35 S. W. Rep. 554, and *People v. Harrison*, 223 Ill. 544; 79 N. E. Rep. 164.

<sup>4</sup> The statute "permits a recovery by an employee for an injury caused by the negligence of a co-employee; nor is such a recovery barred, even though the injured one contributed by his own negligence to his injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires

§ 49. **Contributory negligence defined.**—In South Carolina the following definition of contributory negligence has been given: "Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."<sup>5</sup>

§ 50. **Common law rule of contributory negligence preventing a recovery.**—The common law rule of contributory negligence which prevents plaintiff recovering damages has been very succinctly stated by the New Jersey Supreme Court as follows: "In this state the established rule is that if the plaintiff's negligence contributed to the injury, so that, if he had not been negligent, he would have received no injury from the defendant's negligence—the plaintiff's negligence being proximately a cause of the injury—he is without redress, unless the defendant's act was a willful

each to bear the burden thereof." 60 Cong. Rec., 1st Sess., p. 4434. See Appendix B.

"It appears to me that two employees, by slight negligence, might bring on an accident that would kill 50 or 100 passengers; that they would contribute the negligence that produced the accident, and they would recover for their own negligence. That is absolutely true, if I understand the bill, and we do not want to pass such a bill. It almost puts a premium upon a conspiracy among employees to be guilty of negligence that they can take advantage of their own negligence and kill a hundred people besides. That is the effect of the bill." Senator Elkins, of West Virginia. 60 Cong. Rec., 1st Sess., p. 4534.

"It suggests the very anomalous

situation that a passenger pays his fare, and if he contributes to his own injury, he cannot recover, while two employees paid to conduct him safely may by their negligence cause an accident and kill many persons, and yet they can recover." Senator Smith, of Michigan. *Ibid*, p. 4535.

<sup>5</sup> *Cooper v. Ry. Co.* 56 S. C. 91; 34 S. E. 16; approved in *Webster v. Atlantic, etc., R. Co.* 81 S. C. 46; 61 S. E. 1080.

This statute cannot be so turned around as to give an employee a right of action because of his own contributory negligence, on the theory that his own negligence, resulting in his injury, is the negligence of the railroad company. Such a construction leads to an absurdity.

trespass, or amounted to an intentional wrong, and in such a case the comparative degree of negligence of the parties will not be considered.<sup>6</sup> In the trial of cases of this kind,<sup>7</sup> where it appears that both parties were in fault, the primary consideration is that whether the faulty act of the plaintiff was so remote from the injury as not to be regarded, in a large sense, as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence, as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not, in a legal sense, a contributory cause thereof, then the sole question will be whether, under the circumstances, and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately—that is, directly—contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was willful, or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the co-operating negligence of both parties, or to determine the comparative negligence of each.”<sup>8</sup>

**§ 51. Definitions of degrees of negligence.**—In an early day the Supreme Court of Kansas adopted the rule of comparative negligence, and in discussing the law of negligence the court gave the following definitions and made the following observations: “There may be a high degree of diligence, a common degree of diligence, and a slight degree of diligence, with their corresponding degrees of negligence, and these can be clearly enough defined for all practical purposes, and, with a view to the business of life, seems to be all that are really necessary. Common or ordinary diligence

<sup>6</sup> Citing *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 435; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180.

<sup>7</sup> Driving a team and wagon

carelessly into a transit or surveyor's compass standing in the highway.

<sup>8</sup> *State v. Lauer*, 55 N. J. L. 205; 26 Atl. 180; 20 L. R. A. 61.

is that degree of diligence which men in general exercise in respect to their own concerns; high or great diligence is, of course, extraordinary diligence, or that which very prudent persons take of their own concerns; and low or slight diligence is that which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns. Ordinary negligence is the want of ordinary diligence; slight, or less than ordinary negligence, is the want of great diligence; and gross or more than ordinary negligence is the want of slight diligence. \* \* \* Whoever exercises slight care, and no more, is guilty of ordinary negligence; whoever exercises less than slight care is guilty of gross negligence, and may be guilty of willful and wanton wrongs. Whoever exercises great care is guilty of less than slight negligence, and may not be guilty of any negligence at all.”<sup>9</sup>

§ 52. **Comparative negligence.**—The provisions of section 3 radically change the common law rule, and it is said to have introduced the rule of comparative negligence, especially as administered in the state of Georgia. That is true in a measure. If the employee has been guilty of negligence in contributing to his injuries, then, under this Federal statute, his negligence must be compared with that of his employer in determining the measure of his damages, and to that extent the statute has introduced the rule of comparative negligence, but in a modified condition as will appear in subsequent sections.

§ 53. **Origin of rule of comparative negligence.**—In Illinois comparative negligence was first announced in 1858 by Justice Breese after a careful consideration of several English cases.<sup>10</sup> The rule of comparative negligence was enforced

<sup>9</sup> Union Pacific Ry. Co. v. Rolins, 5 Kan. 167; Sawyer v. Sauer, 10 Kan. 466; Kansas Pacific Ry. Co. v. Pointer, 14 Kan. 37; Kansas

R. Co. v. Plovey, 29 Kan. 169; Atchison etc., R. Co. v. Henry, 57 Kan. 154.

<sup>10</sup> Galena, etc., R. Co. v. Jacobs, 20 Ill. 478.



in that state, with many vicissitudes, until the common law rule of contributory negligence was finally adopted, thereby overruling a long line of cases, establishing a doctrine with many refinements, and which, judging from the many errors pointed out in the supreme and appellate courts of that state, were never fully understood by all the *nisi prius* judges and members of the bar of that state.<sup>11</sup> In the early decisions of Kansas the rule also prevailed where the negligence of the injured person was slight and that of the culpable individual gross in comparison.<sup>12</sup> In that state, however, the rule has been abrogated.<sup>13</sup> In Georgia the rule was adopted at an early day, perhaps not in the same sense as the Illinois rule, but with so slight a distinction as to result in practice to little difference.<sup>14</sup> In one case it is said that the rule adopted in that state is the rule that prevails in admiralty.<sup>15</sup> The several decisions of the Georgia Supreme Court resulted in the productions of three sections of the code of that state, varying in their terms as applied to different conditions under which the injuries were inflicted.

§ 54. **Georgia statutes.**—The following are the sections of the Georgia code from which some of the provisions of

<sup>11</sup> That the rule of comparative negligence is no longer in force, see *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9; 40 N. E. Rep. 938; *City of Lanark v. Dougherty*, 153 Ill. 163; 38 N. E. Rep. 892; *Cicero, etc., St. Ry. Co. v. Meixner*, 160 Ill. 320; 43 N. E. 823; 31 L. R. A. 331; *Cleveland, etc., Ry. Co. v. Maxwell*, 59 Ill. App. 673; *Atchison, etc., Ry. Co. v. Feehan*, 149 Ill. 202; 36 N. E. Rep. 1036; *Illinois, etc., R. Co. v. Ashline*, 56 Ill. App. 475; *Calumet, etc., Co. v. Nolan*, 69 Ill. App. 104.

<sup>12</sup> *Caulkins v. Mathews*, 5 Kan.

191; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167; *Sawyer v. Sauer*, 10 Kan. 466.

<sup>13</sup> *Atchison, etc., R. Co. v. Henry*, 57 Kan. 154; 45 Pac. Rep. 576.

<sup>14</sup> For origin of rule, see *Macon, etc., R. Co. v. Denis*, 18 Ga. 684; *Central, etc., R. Co. v. Denis*, 19 Ga. 437; *Macon, etc., R. Co. v. Davis*, 28 Ga. 111; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, 431; *Central R. Co. v. Brinson*, 70 Ga. 207.

<sup>15</sup> *Macon, etc., R. Co. v. Winn*, 26 Ga. 250; see *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, 432.



the Federal Employers' Liability Act were drawn: "No person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."<sup>16</sup> "If the person injured is himself an employe of the railroad company, and the damage was caused by another employe, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."<sup>17</sup> "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."<sup>18</sup>

§ 55. **Differs from Federal statute.**—Read together these three sections of the Georgia Code differ to some extent in the rule they set forth from that adopted in the Federal statute. Thus, the latter statute does not require in any of its provisions that the plaintiff must have been in the exercise of due care or any care, but in Section 3830 of the former if he "by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way

<sup>16</sup> Georgia Code, 1895, Sec. 2322. It will be noted that by this section negligence of the injured person contributing to the injury will not bar a recovery, but will reduce the amount he would otherwise be entitled to recover.

<sup>17</sup> Georgia Code, 1895, Sec. 2323. In this section it will be noted that the common law rule of the negligence of a fellow servant is

abrogated; but the injured employee must be free from negligence contributing to his injury.

Under this section if the servant injured was himself at fault, he cannot recover; nor can the damages under this section be apportioned. *East Tennessee, etc., R. Co. v. Maloy*, 77 Ga. 237.

<sup>18</sup> Georgia Code, 1895, Sec. 3830.

have contributed to the injury sustained." Section 2322 declares that the plaintiff shall not recover when the injury to himself "is caused by his own negligence," and then adds that if he and the agents of the railway company be both at fault, he may recover, the damages to be diminished by the jury "in proportion to the amount of default attributable to him." In the section abrogating the fellow servant rule (Section 2323) where he is injured by a fellow servant, he must be "without fault or negligence." It may be well to consider the construction the Georgia Supreme Court has put upon these three sections when taken together.<sup>18\*</sup>

**§ 56. Georgia statutes construed.**—After quoting the three sections of the Georgia code, the Supreme Court of that state put this construction upon them: "It will be seen that, although the presumption is always against the [railroad] company, yet it may rebut that presumption and relieve itself of damages by showing that [1] its agents have exercised all ordinary and reasonable care and diligence to avoid the injury, or [2] it may show that the damage was caused by the plaintiff's own negligence; or [3] it may show that the plaintiff by ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence. Upon either of these grounds the defendant may rest his defense. But these rules of law will not cover the facts of every case, for it may be that both the plaintiff and the agents of defendant are at fault, and when they are, then, whilst damages may be recovered, they are to be diminished by the jury in proportion to the default of the plaintiff for his want of ordinary care in avoiding the injury to himself."<sup>19</sup> In this same case, in a concurring opinion, it is said: "Where one causes the injury by going where he had no excuse to go, as one of ordinary sense, as under a car in motion, or consents to it by lying down deliberately on

<sup>18\*</sup> It should be observed that the doctrine of comparative negligence does not apply in Georgia as between a railway company and its employee. This is clearly pointed out in a Florida decision, *Duval v. Hunt*, 34 Fla. 85; 15 So. 876, and *Ryland v. Atlantic*

*Coast Line R. Co.* 57 Fla. 143; 49 So. 745.

<sup>19</sup> *Central R. Co. v. Brinson*, 64 Ga. 479; approved, *Savannah, etc., R. Co. v. Stewart*, 71 Ga. 427; *Georgia, etc., R. Co. v. Thomas*, 68 Ga. 744.

the track and being run over, and in such cases as these, Section 3034 <sup>20</sup> applies, because his consent or his own negligence was the sole cause of the injury to his person. But where one is on a track, walking along, though a trespasser in one sense of the word, yet entitled to protection as a human being, and a train of cars comes rushing on toward him, and the danger is impending, but by ordinary care he can step off and save himself from the consequences of the negligence of the conductor in running out of time, then Section 2972 <sup>21</sup> applies; and if he does not step off, he cannot recover. It must be borne in mind that both the principles of defense in Section 2972 and in 3034 are qualified in [these] sections respectively. The qualification in Section 2972 is this: 'But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained'; and the qualification in Section 3034 is: 'If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of the default attributable to him.' Both contain the doctrine of contributory negligence and the effect of it. That effect is more plainly marked in Section 3034 than in Section 2972, yet is seen in each. In Section 3034 the meaning is that where the negligence of the complainant is the sole cause, he cannot recover at all; if it be in part the cause and negligence of the company in part the cause, then he may recover in part. In Section 2972 the meaning is substantially the same, as applicable to the danger impending. Though the plaintiff may have contributed in some way to the peril impending—"the injury sustained" by him in consequence of it—yet he may recover, if he could not, by ordinary

<sup>20</sup> "No person shall recover damages from a railroad company for injury to himself or property where the same is done by his consent or is caused by his own negligence." Sec. 3034 is now Sec. 2322.

<sup>21</sup> "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." Sec. 2972 is now Sec. 3830.

care, have got out of the peril and escaped the injury. Recover what? And the company 'relieved to what extent?' Certainly to the extent of plaintiff's contributory blame the company is relieved, and the plaintiff may recover damages less the just apportionment or proportionment of his own contributory fault."<sup>22</sup> "Construing those three sections in *pari materia*, as one law, relating to injuries done to persons by railroads, the obvious meaning is that the company shall be liable for injuries done by their agents, in running trains or otherwise, in their service and employment, but when the person injured is wholly at fault, even if not himself an employe, he shall recover nothing; if partly at fault, he shall recover less than full damages, to be fixed by a jury; if an employe, he must be blameless to recover at all, but if blameless, the fact that he is a servant of the company shall not bar his recovery."<sup>23</sup>

**§ 57. Contributory negligence of plaintiff before defendant's negligence began.**—In Georgia, under the Code, the plaintiff's negligence which contributes to the injury and which bars a recovery must be such negligence of his as arises after the negligence of the defendant began or was existing, to the plaintiff's knowledge. "A party cannot be charged with the duty of using any degree of care or diligence to avoid the negligence of a wrongdoer until he has reason to apprehend the existence of such negligence. No one can be expected to guard against what he does not see and cannot foretell. The rule, therefore, which requires one to exercise care and diligence to avoid the consequences of another's negligence, necessarily applies to a case where there is opportunity of exercising this diligence after the negligence has begun and has become apparent."<sup>24</sup> The rule

<sup>22</sup>Savannah, etc., R. Co. v. Stewart, 71 Ga. 427.

<sup>23</sup>Thompson v. Central R. Co. 54 Ga. 509; Central Ry. Co. v. Brinson, 70 Ga. 297; Savannah, etc., R. Co. v. Stewart, 71 Ga. 427.

<sup>24</sup>Macon, etc., Ry. Co. v. Holmes, 103 Ga. 658; 30 S. E. 563; Conner v. Bartfield, 102 Ga. 489; 34 S. E. 90; Savannah, etc., Ry. Co. v. Day, 91 Ga. 676; 17 S. E. 959; Central, etc., R. Co. v. At-



has thus been stated: "The duty imposed by law upon all persons to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence of such other is existing, and is either apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. In such cases, and in such cases only, does the failure to exercise ordinary care to escape the consequences of negligence entirely defeat a recovery. In other cases (that is, where the person injured by the negligence of another is at fault himself, in that he did not, before the negligence of the other became apparent, or before the time arrived when, as an ordinarily prudent person, it should have appeared to him that there was reason to apprehend its existence, observe that amount of care and diligence which would be necessary under like circumstances by an ordinarily prudent person), such fault or failure to exercise due care or diligence at such time would not entirely preclude a recovery, but would authorize the jury to diminish the damages 'in proportion to the amount of default attributable' to the person injured. "This rule [of comparative negligence] authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where, by the exercise of care on his part, he could not have avoided the consequences of the defendant's negligence. If the plaintiff knows of the defendant's negligence, and fails to exercise that care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent an injury which will result from such negligence, it is well settled he cannot recover. If the negligence of the defendant was existing at the time that plaintiff was hurt, and he, in the exercise of that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances, could have discovered the de-

taway, 90 Ga. 661; 16 S. E. 956;     wick, etc., R. Co. v. Gibson, 97 Ga. Americus, etc., Ry. Co. v. Luckie, - 497; 25 S. E. 484.  
87 Ga. 6; 13 S. E. 105; Bruns-



defendant's negligence, and when discovered could, by the exercise of a like degree of care, have avoided the same, then he cannot recover. If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would reasonably have apprehended that the defendant might be negligent at the time when, and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to have prevented the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed. If there is anything present at the time and place which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained; and if he fails to do this, and is injured,<sup>25</sup> he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury."<sup>26</sup>

§ 58. **Burden on plaintiff to show freedom from his own fault.**—In all the Illinois cases, the burden is upon the plaintiff to show his freedom from fault contributing to the in-

<sup>25</sup> Because of such failure.

<sup>26</sup> *Western, etc., Ry. Co. v. Ferguson*, 113 Ga. 708; 39 S. E. 306; *Freeman v. Nashville, etc., Ry. Co.* 120 Ga. 469; 47 S. E. 931; *Western, etc., Ry. Co. v. York*, 128 Ga. 687; 58 S. E. Rep. 183; *Atlanta, etc., Ry. Co. v. Gardner*, 122 Ga. 82; 49 S. E. Rep. 818.

In case of a wanton injury, contributory negligence is no defense in Georgia. *Southern Ry. Co. v. Wesley*, 9 Ga. App. —; 71 S. E. 11; *Central of Georgia Ry. Co. v. Moore*, 5 Ga. App. 562; 63 S. E. 642; *Warfield v. Sanburn*, 9 Ga. App. —; 71 S. E. 733.

If the plaintiff fails to observe ordinary care after discovering his danger and the negligence of the defendant, the doctrine of comparative negligence is said not to apply. *Moore v. Gainesville Midland Ry. Co.* 9 Ga. App. —; 71 S. E. 808; *Atlanta, K. & N. Ry. Co. v. Gardner*, 122 Ga. 82; 49 S. E. 818; *Warfield v. Sanburn*, 9 Ga. App. —; 71 S. E. 703.

If "somewhat at fault" the injured person may recover, but not if he failed to use ordinary care. *Wrightsville & T. R. Co. v. Tompkins*, 9 Ga. App. —; 70 S. E. 955.

jury, although some negligence on his part will not defeat him. "In all those cases,"<sup>27</sup> says the Supreme Court of that state, "this court held, in Jacob's case,<sup>28</sup> that two things must concur to support this action, negligence on the part of the defendant, and no want of ordinary care on the part of the plaintiff, and the question of liability does not absolutely depend on the absence of all negligence on the part of the plaintiff, but upon the relative degree or want of care as manifested by both parties."<sup>29</sup>

**§ 59. Charge to jury under Georgia Code.**—The following instruction to the jury was held to be erroneous: "If, by the exercise of ordinary care and diligence, the plaintiff could have avoided the consequences to herself of the defendant's negligence, she cannot recover; but if both parties were at fault, and the alleged injury was the result of the fault of both, then, notwithstanding the plaintiff's negligence, she would be entitled to recover, but the amount of the recovery would be abated in proportion to the amount of the default on her part." The error consisted in stating, without proper explanation and in immediate connection with each other, two distinct rules of law, and thus qualifying the former by the latter, contrary to the purpose of the Georgia code. But the Supreme Court said that the following instruction would be correct: "If, by the exercise of ordinary care and diligence, the plaintiff could have avoided the consequences to herself of the defendant's negligence, she cannot recover; but if both parties were at fault, and the alleged injury was the result of the fault of both, and you find from the evidence that the plaintiff could not by ordinary care have avoided the alleged injury to herself, occasioned by defendant's negligence, then, notwithstanding she may have been to some extent negligent, she would be entitled to recover. But the amount of damages should be apportioned to the amount of the default on her part."<sup>30</sup>

<sup>27</sup> Galena, etc., R. Co. v. Yorwood, 15 Ill. 469; Galena, etc., J. Co. v. Fay, 16 Ill. 567; Galena, etc., R. Co. v. Jacobs, 20 Ill. 485.

<sup>28</sup> Galena, etc., R. Co. v. Jacobs, 20 Ill. 478.

<sup>29</sup> Chicago, etc., R. Co. v. Hazard, 26 Ill. 373.

<sup>30</sup> Americus, etc., R. v. Luckie, 87 Ga. 6; 13 S. E. 105; Brunswick, etc., R. Co. v. Gibson, 97 Ga. 489; 25 S. E. 484; Cain v.

§ 60. **Recovery by a railway employe.**—Speaking of the deceased's acts for whose death an action had been brought to recover damages, the Supreme Court of Georgia said: "He was an employe of the road. It is to be presumed, therefore, that he well knew that the platform on which he was, when killed, was a place of extra danger. In addition to this he was told by the conductor that the place was one of danger, that he was violating a rule of the road, and that he must come inside. This he disregarded and was killed, whilst another young man, who was with him, heeded it, went inside the car, and escaped unhurt. Ought he, or those standing in his right, under such circumstances, to recover full damages, to recover as much as if he had been guilty of no negligence himself? We think not. We will not undertake to say how much such conduct as this ought to reduce the recovery, but we will say that it ought to reduce it much."<sup>31</sup>

§ 61. **Widow recovering for death of her husband—Georgia statute—Contributory negligence of deceased.**—In Georgia a statute allows a recovery by a widow for the death of her husband if the death was caused by the negligence of the defendant, and the injury was occasioned "without fault or negligence on the part of the person injured."<sup>32</sup> In construing this clause the Supreme Court of that state says: "If the deceased immediately or remotely, directly or indirectly, caused the injury, or any part of it, or contributed to it at all, his wife could not recover."<sup>33</sup>

Macon, etc., R. Co. 97 Ga. 298; 22 S. E. 918; Macon, etc., Ry. Co. v. Holmes, 103 Ga. 655; 30 S. E. 563.

<sup>31</sup> Youge v. Kinney, 28 Ga. 111; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Hendricks v. Western, etc., R. Co. 52 Ga. 467; Southwestern R. Co. v. Johnson, 60 Ga. 667.

<sup>32</sup> Georgia Civil Code, Sec. 2323.

<sup>33</sup> Prather v. Richmond, etc., R. Co. 80 Ga. 427; 9 S. E. 530; 12 Am. St. Rep. 263; approved in Western, etc., R. Co. v. Herndon, 114 Ga. 168; 39 S. E. 911; Blackstone v. Central Ry. Co. 102 Ga. 489; 31 S. E. 90; Chattanooga S. R. Co. v. Myers, 112 Ga. 237; 37 Ga. 439; Walker v. Atlanta, etc.,

§ 62. **Apportionment of damages.**—In commenting upon the apportionment of damages according to the fault of the parties, the Supreme Court of Georgia said: “If the plaintiff neither consented to, nor caused the injury, care and diligence of the company’s agents must be shown to have been ordinary and reasonable. No less degree will suffice for complete exoneration. If that degree cannot be established, the plaintiff must recover something, and the question will be whether his recovery can be reduced to partial compensation only. But one thing will so reduce it, and that is proof of contributory negligence on his part. For the same reason that recovery is wholly defeated when his negligence is shown to have been the sole cause of the injury, it will be defeated in part when his negligence is shown to have been part of the cause. However slight it will count against him, and though the company be chargeable with something, he, on the other hand, must lose something. For the apportionment of damages according to the relative fault of the parties, there seems to be no standard more definite than the enlightened opinion of the jury. But it should not be overlooked that the defendant is not to be deemed in fault at all, unless there was a failure to exercise ordinary care or reasonable diligence. For simply falling short of extreme and ordinary care and diligence, the defendant is not liable, even to contribute.”<sup>34</sup> But “for simply falling short of

R. Co. 103 Ga. 826; 30 S. E. 503; Georgia, etc., R. Co. v. Hicks, 95 Ga. 301; 22 S. E. 613; Georgia, etc., R. Co. v. Hallman, 97 Ga. 317; 23 S. E. 73; Georgia, etc., R. Co. v. Hicks, 95 Ga. 302; 22 S. E. 613.

<sup>34</sup> Georgia, etc., Co. v. Neely, 56 Ga. 580; Atlanta, etc., R. Co. v. Ayers, 53 Ga. 12.

If both plaintiff and defendant are at fault, the damages are to be diminished in proportion to the fault attributable to the

plaintiff. Central R. Co. v. Brinson, 64 Ga. 475; Atlanta, etc., R. Co. v. Wyly, 65 Ga. 120; Georgia R. v. Pittman, 73 Ga. 325; Brunswick, etc., R. Co. v. Hoover, 74 Ga. 426; Augusta, etc., R. Co. v. Killian, 79 Ga. 236; 4 S. E. 164; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368; 54 S. E. Rep. 110; Hill v. Callahan, 82 Ga. 113; 8 S. E. Rep. 730; Pierce v. Atlanta Cotton Mills, 79 Ga. 782; 4 S. E. Rep. 381; Ingraham v. Hilton, etc., Co. 108 Ga. 194; 33



extreme and extraordinary care and diligence, the defendant is not liable even to contribute."<sup>35</sup> "If the plaintiff, by the exercise of ordinary care, could have avoided the consequences to himself of the defendant's negligence, he cannot recover at all. But in other cases (that is, in cases where, by ordinary care, he could not have avoided the consequences of defendant's negligence), the circumstances that the plaintiff may have, in some way, contributed to the injury, shall not entirely relieve the defendant, but the damages shall be apportioned according to the amount of the default attributable to each."<sup>36</sup>

**§ 63. An epitome of the Georgia cases.**—The following is an epitome of the Georgia cases: The plaintiff must have used ordinary care to avoid the injury;<sup>37</sup> the burden is upon

S. E. Rep. 961; *Glaze v. Josephine Mills*, 119 Ga. 261; 46 S. E. Rep. 99; *Wrightsville, etc., Co. v. Gornite*, 129 Ga. 204; 58 S. E. Rep. 769.

"For the apportionment of damages according to the relative fault of the parties, there seems to be no standard more definite than the enlightened opinion of the jury." *Georgia, etc., Co. v. Neely*, 56 Ga. 540.

<sup>35</sup> *Georgia, etc., Co. v. Neely*, 56 Ga. 540.

<sup>36</sup> *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Younge v. Kinney*, 28 Ga. 111. *Alabama, etc., R. Co. v. Coggins*, 88 Fed. Rep. 455; 32 C. C. A. 1.

<sup>37</sup> *Branan v. May*, 17 Ga. 136; *Macon, etc., Ry. Co. v. Winn*, 19 Ga. 440; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409, 431; *Mayor, etc., v. Dodd*, 58 Ga. 238; *Georgia R. Co. v. Thomas*, 68 Ga. 744; *Augusta, etc., R. Co. v. Killian*, 79 Ga. 236; 4 S. E. 164; *Ameri-*

*cus, etc., R. Co. v. Luckie*, 87 Ga. 7; 13 S. E. 105; *Central R. Co. v. Attaway*, 90 Ga. 65; 16 S. E. Rep. 956; *Brunswick, etc., R. Co. v. Gibson*, 97 Ga. 497; 25 S. E. Rep. 484; *Central R. Co. v. Attaway*, 90 Ga. 661; 16 S. E. 958; *Comer v. Barfield*, 102 Ga. 489; 31 S. E. Rep. 90; *Georgia, etc., R. Co. v. Nilus*, 83 Ga. 70; 9 S. E. Rep. 1049; *Macon, etc., R. Co. v. Holmes*, 103 Ga. 658; 30 S. E. Rep. 565; *Jenkins v. Central R. Co.* 89 Ga. 756; 15 S. E. Rep. 655; *Atlanta, etc., R. Co. v. Loftin*, 86 Ga. 43; 12 S. E. Rep. 186; *Western, etc., R. Co. v. Bloomingdale*, 74 Ga. 604; *Lovier v. Central, etc., R. Co.* 71 Ga. 222; *Higgins v. Cherokee R. Co.* 73 Ga. 149; *Tift v. Jones*, 78 Ga. 700; 3 S. E. Rep. 399; *Richmond, etc., R. Co. v. Howard*, 79 Ga. 44; 3 S. E. Rep. 426; *Comer v. Shaw*, 98 Ga. 545; 25 S. E. Rep. 733; *Briscoe v. Southern Ry. Co.* 103 Ga. 224; 28 S. E. Rep. 638; *Cen-*



him to show that fact.<sup>38</sup> The duty to use ordinary care does not arise until the negligence of the defendant is ex-

tral Ry. Co. v. Dorsey, 106 Ga. 826; 32 S. E. Rep. 873; Hopkins v. Southern Ry. Co. 110 Ga. 167; 35 S. E. Rep. 170; Western, etc., R. Co. v. Bradford, 113 Ga. 276; 38 S. E. Rep. 823; Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620; 37 S. E. Rep. 873; Western, etc., R. Co. v. Ferguson, 113 Ga. 708; 39 S. E. Rep. 306; Porter v. Ocean S. S. Co. 113 Ga. 1007; 39 S. E. Rep. 470; Louisville, etc., R. Co. v. Thompson, 113 Ga. 983; 39 S. E. Rep. 483; Western, etc., R. Co. v. Herndon, 114 Ga. 168; 39 S. E. Rep. 911; Roberts v. Albany, etc., R. Co. 114 Ga. 678; 40 S. E. Rep. 698; Mansfield v. Richardson, 118 Ga. 250; 45 S. E. 269; Savannah, etc., Ry. Co. v. Hatcher, 118 Ga. 273; 45 S. E. Rep. 239; Central Ry. Co. v. McKinney, 118 Ga. 535; 45 S. E. Rep. 430; Wilkins v. Grant, 118 Ga. 522; 45 S. E. Rep. 415; Wrightsville, etc., R. Co. v. Lattimore, 118 Ga. 581; 45 S. E. 453; Ludd v. Wilkins, 118 Ga. 525; 45 S. E. Rep. 429; Edwards v. Central, etc., R. Co. 118 Ga. 678; 45 S. E. Rep. 462; Southern Ry. Co. v. Gore, 128 Ga. 627; 58 S. E. Rep. 180; Central Ry. v. McClifford, 120 Ga. 90; 47 S. E. Rep. 590; Little v. Southern Ry. Co. 120 Ga. 347; 47 S. E. Rep. 953; Griffith v. Lexington, etc., Ry. Co. 124 Ga. 553; 53 S. E. Rep. 97; Moore v. C. L. King Mfg. Co. 124 Ga. 576; 53 S. E. Rep. 107; Collins v. Southern Ry. Co. 124 Ga. 853; 53 S. E. Rep. 388; Central Ry. Co. v. Harper, 124 Ga. 836; 53 S. E. Rep. 391; Southern Ry.

Co. v. Brown, 126 Ga. 1; 54 S. E. Rep. 911; Cawood v. Chattahoochee, 126 Ga. 159; 54 S. E. Rep. 944; Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204; 58 S. E. 769; City of Americus v. Johnson, 2 Ga. App. 378; 58 S. E. Rep. 518; Southern Ry. Co. v. Gladner (Ga. App.), 58 S. E. Rep. 249; Vinson v. Willingham Cotton Mills, 2 Ga. App. 53; 58 S. E. Rep. 413; Southern Ry. Co. v. Rowe, 2 Ga. App. 557; 59 S. E. Rep. 462; Rollesone v. T. Cassier & Co., 3 Ga. App. 161; 59 S. E. Rep. 442; Central Georgia Ry. Co. v. Clay, 3 Ga. App. 286; 59 S. E. Rep. 843; Southern Ry. Co. v. Monchett, 3 Ga. App. 266; 59 S. E. Rep. 710; Sanders v. Central Ry. Co. 123 Ga. 763; 50 S. E. Rep. 728.

<sup>38</sup> Denol v. Central Ry. Co. 119 Ga. 246; 46 S. E. Rep. 107; Eagle, etc., Mills v. Herron, 119 Ga. 389; 46 S. E. Rep. 405; Macon, etc., Ry. Co. v. McLendon, 119 Ga. 297; 46 S. E. Rep. 106; Russell v. Central Ry. 119 Ga. 705; 46 S. E. Rep. 858; Columbus R. Co. v. Dorsey, 119 Ga. 363; 46 S. E. Rep. 635; Simmons v. Seaboard, etc., R. Co. 120 Ga. 225; 47 S. E. Rep. 570; Christian v. Macon, etc., Co. 120 Ga. 314; 47 S. E. Rep. 23; Southern Ry. Co. v. Bandy, 120 Ga. 463; 47 S. E. Rep. 923; Banks v. J. S. Schofield Sons' Co. 126 Ga. 667; 55 S. E. Rep. 39; Atlanta, etc., R. Co. v. O'Neil, 127 Ga. 685; 56 S. E. Rep. 986; Turley v. Atlanta, etc., R. Co. 127 Ga. 594; 56 S. E. Rep. 748; Roquemore v. Albany, etc., R. Co. 127

isting or is apparent, or circumstances are such that an ordinarily prudent person would have reason to apprehend its existence.<sup>39</sup> And in case of negligence on the part of both parties, the plaintiff may still recover if the defendant's was great.<sup>40</sup> If the defendant has been grossly negligent, the statute does not apply.<sup>41</sup> If both parties had equal opportunity to avoid the injury, no question of apportionment of

Ga. 330; 56 S. E. Rep. 424; Moore v. Dublin Cotton Mills, 127 Ga. 609; 56 S. E. Rep. 839; Southern Ry. Co. v. Dean (Ga.), 57 S. E. Rep. 702; Brown Store Co. v. Chattahoochee, 1 Ga. App. 609; 57 S. E. Rep. 1043; Sanders v. Central Ry. Co. 123 Ga. 763; 50 S. E. Rep. 728; Richmond R. Co. v. Mitchell, 92 Ga. 77; 18 S. E. Rep. 290; Savannah, etc., Co. v. Bell, 124 Ga. 663; 53 S. E. Rep. 109; City of Atlanta v. Harper, 129 Ga. 415; 59 S. E. Rep. 230.

<sup>39</sup> Freeman v. Nashville, etc., Ry. Co. 120 Ga. 469; 47 S. E. Rep. 931; Western, etc., Ry. Co. v. York, 128 Ga. 687; 58 S. E. Rep. 183.

The following instruction has been approved by the Georgia court. "If the plaintiff, by ordinary care, could have avoided the consequence to himself caused by the defendant's negligence (if the evidence shows negligence on the part of the defendant), the plaintiff will not be entitled to recover. But if the plaintiff did use ordinary care, and if while in the use thereof, by reason of the defendant's negligence, he sustained injury, the defendant will not be relieved, although the plaintiff in some way may have contributed to the injury sustained."

Mayor, etc., v. Dodd, 58 Ga. 238; Macon, etc., R. Co. v. Davis, 18 Ga. 679.

<sup>40</sup> Younge v. Kenney, 28 Ga. 111. In this case it was said: "The deceased may have been guilty of some negligence; this does not excuse the railroad, if they [the jury] believe the officers were greatly more at fault than the deceased."

"Although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent, and thereby occasioned or did not prevent the mischief, the action may be maintained." Augusta, etc., R. Co. v. McElmurry, 24 Ga. 75; Macon, etc., Ry. Co. v. Davis, 18 Ga. 679; Brannan v. May, 17 Ga. 136; Macon, etc., R. Co. v. Winn, 19 Ga. 440.

<sup>41</sup> Central, etc., R. Co. v. Smith, 78 Ga. 694; 3 S. E. Rep. 397; Central R. Co. v. Dixon, 42 Ga. 327; Southwestern R. Co. v. Johnson, 60 Ga. 667; Atlanta, etc., Ry. Co. v. Ayers, 53 Ga. 12. It defeats the action only when it amounts to a failure to use ordinary care. Rolleston v. T. Cassier & Co. 3 Ga. App. 161; 59 S. E. Rep. 442; Sims v. Macon, etc., Ry. Co. 28 Ga. 93. See Brown Store Co. v. Chattahoochee Lumber Co. 121 Ga. 809; 49 S. E. Rep. 839.

damages arises.<sup>42</sup> "For simply falling short of extreme and extraordinary care and diligence, the defendant is not liable even to contribute."<sup>43</sup>

<sup>42</sup> *Stewart v. Seaboard Air Line Ry.* 115 Ga. 624; 41 S. E. Rep. 981; *Wrightsville, etc., R. Co. v. Gornton*, 129 Ga. 204; 58 S. E. Rep. 769; *Central Ry. Co. v. McKinney*, 116 Ga. 13; 42 S. E. Rep. 229; *Hobbs v. Bowie*, 121 Ga. 421; 49 S. E. Rep. 285.

If the injury is occasioned by the injured servant violating his master's orders, he cannot recover. *Binion v. Georgia, etc., R. Co.* 118 Ga. 282; 45 S. E. Rep. 276.

That there can be no recovery where the plaintiff is guilty of contributory negligence, see *Louisville, etc., R. Co. v. Edmondson*, 128 Ga. 478; 57 S. E. Rep. 877; *Southern Ry. Co. v. Barfield*, 115 Ga. 724; 42 S. E. Rep. 95; *Nichols v. Tanner*, 117 Ga. 489; 43 S. E. Rep. 489; *Georgia, etc., Co. v. Henderson*, 117 Ga. 480; 43 S. E. Rep. 698; *Norfolk, etc., Ry. Co. v. Perrow*, 101 Va. 345; 43 S. E. Rep. 614; *Chenoll v. Palmer Brick Co.* 117 Ga. 106; 43 S. E. Rep. 443; *Steinhouser v. Savannah, etc., R. Co.* 118 Ga. 195; 44 S. E. Rep. 800; *McDonnell v. Central R. Co.* 118 Ga. 195; 44 S. E. Rep. 800; *McDonnell v. Central R. Co.* 118 Ga. 86; 44 S. E. Rep. 840; *Augusta, etc., R. Co. v. Snider*, 118 Ga. 146; 44 S. E. 1005; *Randolph v. Brunswick, etc., Ry. Co.* 120 Ga. 969; 48 S. E. Rep. 396; *Macon, etc., Ry. Co. v. Anderson*, 121 Ga. 666; 49 S. E. Rep. 791; *Macon, etc., Ry. Co. v. Barnes*, 121 Ga. 443; 49 S. E. Rep. 282; *Central Ry. Co. v. Price*, 121 Ga. 651; 49 S. E. Rep. 683;

*Atlanta, etc., Ry. Co. v. Weaver*, 121 Ga. 466; 49 S. E. Rep. 291; *Meeks v. Atlanta, etc., Ry. Co.* 122 Ga. 266; 50 S. E. Rep. 99; *Walker v. Georgia, etc., Co.* 122 Ga. 368; 50 S. E. Rep. 121; *Tucker v. Central Ry. Co.* 122 Ga. 387; 50 S. E. Rep. 128; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90; 50 S. E. Rep. 979; *Nix v. Southern Ry. Co.* 4 Ga. App. 331; 61 S. E. Rep. 292; *Georgia, etc., Ry. Co. v. Sasser*, 4 Ga. App. 276; 61 S. E. Rep. 993.

<sup>43</sup> *Georgia, etc., Co. v. Neely*, 56 Ga. 540.

In Tennessee comparative negligence is not the accepted rule, the courts holding that when the plaintiff's own negligence is the proximate cause of his injury he cannot recover. But if his negligence be slight, or if he has not exercised a superior degree of care or diligence, he may recover, his conduct being considered in mitigation of his damages. "The principal difference between our rule and the English rule, as modified by the more recent decisions, is in allowing the damages to be mitigated by the conduct of the injured party." *Railroad Co. v. Fain*, 12 Lea, 35; *Jackson v. Nashville, etc., R. Co.* 13 Lea, 491; 49 Am. Rep. 663; *Nashville, etc., R. Co. v. Wheelless*, 10 Lea, 741; 43 Am. Rep. 317; *Whirley v. Whiteman*, 1 Head, 610; *Duch v. Fitzhugh*, 2 Lea, 307; *Hill v. Nashville, etc., R. Co.* 9 Heisk. 823; *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. 347; *Smith v. Nashville, etc., R. Co.* 6 Heisk. 174.

§ 64. **Comparative negligence in Illinois.**—In Illinois, after a long review of many cases in that state, as well as in other states and in England, in 1858, Justice Breese, as a deduction of the cases, lays down this rule: "It will be seen, from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care, as manifested by both parties, for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it perceptible, running through very many of them, as, where there are faults on both sides, the plaintiff shall recover, his fault being measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*<sup>44</sup> and *Lynch v. Nurdin*.<sup>45</sup> We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight,

The rule of comparative negligence does not prevail in Kentucky, as some suppose, *Louisville, etc., R. Co. v. Filbern*, 6 Bush, 574; *City of Covington v. Bryant*, 7 Bush, 248; *Louisville, etc., R. Co. v. Commonwealth*, 80 Ky. 143; 44 Am. Rep. 468; *Louisville, etc., R. Co. v. Collins*, 2 Duv. 114. Helm Bruce, Esq., of Louisville Bar, in *Kentucky Law Journal* for April, 1882; *Kentucky Bridges, etc., Co. v. Sydor*, 82 S. W. Rep. 989; 26 Ky. L. Rep. 951; 68 L. R. A. 183.

In Florida, in an action against a railroad company, a statute provides that "if the complainant and the company are both at fault, the former may recover; but the dam-

ages shall be increased or diminished by the jury in proportion to the amount of default attributable to him." *Laws 1901*, chap. 4071; *General Statutes 1906*, Sec. 3149. Cited and construed, *Louisville & N. R. Co. v. Yarborough*, 60 Fla. —; 54 So. 462.

Before the enactment of this statute the rule of comparative was not in force. *Florida Ry. Co. v. Dorsey*, 59 Fla. 260; 52 So. 963.

Under this statute the damages are "diminished in proportion to the amount or default attributable" to the plaintiff. *Louisville & N. R. Co. v. Yarborough*, 60 Fla. —; 54 So. 462.

<sup>44</sup> Carr v. Payne, 252.

<sup>45</sup> 4 Eng. C. L. 422.



and that of the defendant gross, he shall not be deprived of his action.”<sup>46</sup> In a subsequent Illinois case the court put this interpretation upon the doctrine of comparative negligence as it had been adopted three years before: “We only deem it necessary in this case, to examine the question whether the husband of appellee was guilty of such gross negligence as relieves the company from liability for his death. To authorize a recovery, it is not enough to simply show that the company was guilty of negligence, but it should also appear that deceased was not also guilty of negligence in some degree comparable to that of the company inflicting the injury.

<sup>46</sup>Galena, etc., R. Co. v. Jacobs (1858), 20 Ill. 478.

In Raisin's case the court summed up to the jury as follows: “The question is, whether the plaintiff has made out a case to entitle him to damages. You must be satisfied that the injury was occasioned by the want of care, or the improper conduct of the defendant, and was not imputable in any degree to any want of care or any improper conduct on the part of the plaintiff.” The jury gave the plaintiff a verdict for two hundred and fifty pounds. Chief Justice Tindall then asked the jury how they had made up their verdict; and the foreman answered that there were faults on both sides. “Then,” asked the Chief Justice, “you have considered the whole matter?” The foreman answered that they had.

Thereupon counsel for the defendant submitted to the court that the fact which the foreman had stated entitled the defendant to the verdict; but he was met by the statement of the Chief Justice: “No, there may be faults to a certain extent.” In a note the reporter of the case says: “The

verdict in this case, as well as the opinion of the Chief Justice, seem to be quite correct, and sustainable in point of law, according to the most modern authorities.”

In *Lynch v. Nurdin* the evidence showed that the defendant left his cart and horse unattended in a thronged thoroughfare, and the plaintiff, a child of seven years, got upon the cart in play. Another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. Chief Justice Denman held that the plaintiff was liable in an action on the case, though the child was a trespasser and contributed to the injury by his own act; that though he was a co-operating cause of his own misfortune by doing an unlawful act, he was not deprived of his remedy; and that it was properly left to the jury whether the defendant's conduct was negligent and the injury caused by his negligence.

Chief Justice Denman, in commenting upon the case, concludes by saying: “His [the child's] misconduct bears no proportion to that of the defendant, which produced it.”



Each party is bound, whilst pursuing their legal business, to exercise a due regard for the rights of others. And when each is equally at fault, and both parties negligent, the injured party has no right to recover for an injury he has thus contributed to produce. Each party must employ all reasonable means to foresee and prevent injury. Whether the party receiving the injury has acted with even a slight degree of negligence contributing to produce the injury, to recover he must show that the other party has been guilty of gross negligence. Whilst the party upon whom the injury is inflicted must use all reasonable care, he is not held to the highest degree of precaution of which the human mind is capable. Nor to recover, need he be wholly free from negligence, if the other party has been culpable."<sup>47</sup>

§ 65. **Negligence a relative term.**—"In applying the measure of slight and gross negligence to the acts of the respective parties charged to have been negligent," said Justice Scholfield of the Supreme Court of Illinois, "it is, of course, always to be held in remembrance that the term 'negligence' is, itself, relative, 'and its application depends on the situation of the parties, and the degree of care and diligence which the circumstances reasonably impose.'<sup>48</sup> The question, therefore, in the present instance, related to the measure of care, under the circumstances shown by the evidence to have existed, imposed upon the respective parties.<sup>49</sup> Whether, therefore, the plaintiff's intestate failed

<sup>47</sup> *Chicago, etc., R. Co. v. Dewey* (1861), 26 Ill. 255. This was a case where the deceased attempted to pass between two sections of a freight train, in the night time, in order to reach an approaching passenger train he desired to board, and was caught between the bumpers of two freight cars of the two sections of the freight train backing up together, and

was killed. A recovery was denied, because the facts showed he was guilty of gross negligence and the defendant was not guilty of any negligence for its engineer had a right to presume no one would attempt to pass between the two freight train sections.

<sup>48</sup> Citing *Cooley on Torts*, 630.

<sup>49</sup> *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512.

to exercise ordinary care, is to be determined—and there can be no presumption under these circumstances otherwise—with reference to his rights, duties and obligations, and the rights, duties and obligations of the defendant, under the peculiar circumstances here in evidence. Being thus determined that he has failed to exercise ordinary care, the legal conclusion is, he is guilty of negligence.”<sup>50</sup>

§ 66. **Illinois rule extended.**—The rule of comparative negligence as first announced in Illinois, namely, “that there must be negligence on the part of the defendant, and no want of ordinary care on the part of the plaintiff, and where there has been negligence in both parties, still the plaintiff may recover, where his negligence is slight, and that of the defendant is gross, in comparison with that of the plaintiff,” was at a later period “extended to include cases where the negligence of the plaintiff had contributed in some degree to the injury complained of.” This was “upon the principle that, although a party may have himself been guilty of negligence, it does not authorize another to recklessly and wantonly destroy his property or commit a personal injury.”<sup>51</sup>

§ 67.—**Ordinary care wanting—Plaintiff’s negligence slight.**—The fact that the negligence of the plaintiff was slight did not enable him to recover, if he had not observed ordinary care to avoid the injury and an instruction which omitted the statement that the plaintiff must have used ordinary care was held erroneous. “The fact that the defendant may have been guilty of gross negligence does not authorize a recovery. A duty rests on the injured party to exercise ordinary care, and, unless that duty has been observed, a recovery cannot be had. In other words, ordinary care is an essential element on the part of the injured party to authorize a re-

<sup>50</sup> Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

R. Co. v. Gretzner, 46 Ill. 75;  
Rockford, etc., R. Co. v. Coultas,  
67 Ill. 398.

<sup>51</sup> Chicago, etc., R. Co. v. Van Patten, 64 Ill. 510; Chicago, etc.,

covery. But that element was omitted from the instruction [given]; and the jury was, in substance, told that the plaintiff, although guilty of some negligence, might recover, if the negligence of the defendant was gross, and the negligence of the plaintiff was slight, in comparison with the negligence of the defendant. We do not regard this as a correct proposition of law, or as a correct enunciation of the doctrine of comparative negligence. The plaintiff may have failed to exercise ordinary care when his acts and conduct are considered in the light of all the evidence, and yet, under the terms of this instruction, he might recover if his negligence was only slight when compared alone with that of defendant. In considering the doctrine of comparative negligence, expressions may be found in several cases which might sustain the instruction, where it has been said, in a general way, that an injured party, guilty of slight negligence, may recover, where the negligence of the defendant was gross, and the negligence of the plaintiff slight, in comparison with the negligence of the defendant but it has always been understood, and the declaration has always been made with the understanding that in no case can a recovery be had unless the person injured has exercised ordinary care for his safety."<sup>52</sup>

<sup>52</sup> Willard v. Swanson, 126 Ill. 381; 18 N. E. 548; affirming 12 Bradw. (Ill.) 631; Fisher v. Cook, 125 Ill. 280; 17 N. E. 763.

This instruction was held to be correct: "If the jury believe from the evidence that the plaintiff was injured as charged in the declaration, and that he or the person who was driving the buggy in which he sat was guilty of some negligence which contributed to said injury, but that said negligence of the plaintiff or of said person driving the buggy, if any, was slight, and that the defendant, by his servant, was guilty of

negligence, as charged in the declaration, and that said negligence, if any, of said defendant, caused said injury to the plaintiff, and that said negligence, if any, of the defendant was gross, and the negligence of the said plaintiff, or the person driving said buggy, was slight when compared therewith, then the jury are instructed that such slight negligence on the part of the plaintiff, or the person driving said buggy, if you find from the evidence it was slight, will not prevent the plaintiff from recovering in this case." In another instruction the sentence,

§ 68. **Want of ordinary care defeats a recovery.**—The want of ordinary care on the part of the plaintiff could not be construed as “slight negligence” on his part. Speaking of erroneous instructions on this point that had been given, Justice Scholfield of Illinois, in a case in the Supreme Court of that state, said: “The utmost degree of negligence merely—and it is of this only and not of trespass or other wrongs that the instructions speak—of which the defendant can be guilty, is gross negligence. The plaintiff’s negligence, then, by the very terms employed, is ordinary, and that of the defendant gross, in comparison with each other. The language employed, in effect, says, although, as to this particular act, the plaintiff’s intestate was guilty of ordinary negligence, and the defendant guilty of gross negligence, still, if the jury believe the plaintiff’s intestate’s negligence was slight—that is, that it was not what the very terms employed admit it to have been—and that of the defendant gross, in comparison with each other, they will find the defendant guilty. Surely it needs no demonstration that if, as to a particular act, the negligence of the plaintiff was ordinary and that of the defendant gross, their relation is

“If the jury find from the evidence that neither the plaintiff nor the person who was driving the buggy in which he sat was guilty of any negligence which contributed to said injury,” was sufficient to cover the charge that plaintiff must have exercised ordinary care to avoid the injury. *Chrisfin v. Erwin*, 125 Ill. 619; 17 N. E. 707.

An instruction on comparative negligence which omitted to state that the plaintiff must have been in the exercise of due care when injured to avoid the injury was deemed not erroneous if in another instruction that charge was given. *Chicago, etc., R. Co. v.*

*Fetsam*, 123 Ill. 518; 15 N. E. 169; *Chicago, etc., R. Co. v. Johnson*, 116 Ill. 206; 4 N. E. 381; *Chicago, etc., R. Co. v. Ryan*, 70 Ill. 211; S. C. 60 Ill. 172.

An instruction to the jury that if they “believe from the evidence that the plaintiff was wholly without negligence, yet, if you further believe from the evidence that the defendant was guilty of gross negligence, while the plaintiff was guilty of slight negligence, then such slight negligence will not prevent a recovery,” was erroneous, because it assumes that the plaintiff exercised ordinary care. *Toledo, etc., R. Co. v. Cline*, 135 Ill. 41; 25 N. E. 846.



not changed by comparing them with each other. The same evidence that determines the one is gross and the other ordinary, fixes their relative degrees with reference to each other."<sup>53</sup>

<sup>53</sup>Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

"It seems to be thought what is said in *Stratton v. Central City Horse Ry. Co.* 95 Ill. 25, in criticising certain instructions there given, sustains the ruling below in regard to these instructions. This is a misapprehension. In those instructions it was said a failure to exercise ordinary care was gross negligence, and in one it was said no action would lie if the plaintiff failed to exercise ordinary care, unless the defendant inflicted the injury. We have before herein shown both these positions to be inaccurate. The failure to exercise ordinary care is only ordinary negligence, and although a plaintiff might not exercise ordinary care, yet the defendant would be liable for injuring him if his act causing injury was so willfully and wantonly reckless as to authorize the presumption of an intention to injure generally, notwithstanding he might have had no special intention to injure the plaintiff." Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

"It must be conceded that the doctrine of comparative negligence has no place in a case where the plaintiff has failed to exercise ordinary care." "The failure to exercise ordinary care is more than slight negligence." Toledo, etc., R. Co. v. Cline, 31 Ill. App. 563.

There must have been "no want

of ordinary care on the part of the plaintiff." Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74; Illinois, etc., R. v. Simmons, 38 Ill. 242; Western U. T. Co. v. Quinn, 56 Ill. 319; Centralia v. Krouse, 64 Ill. 19; Chicago, etc., R. Co. v. Gregory, 58 Ill. 272; Chicago, etc., Ry. Co. v. Bentz, 38 Ill. App. 485; Illinois, etc., R. Co. v. Green, 81 Ill. 19; Quiney v. Barker, 81 Ill. 300; Toledo, etc., R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846.

Plaintiff had the burden to show that the defendant was negligent and that he himself used due care. Chicago, etc., R. Co. v. Hazzard, 26 Ill. 373; Chicago, etc., R. Co. v. Dewey, 26 Ill. 255; Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74; Chicago, etc., R. Co. v. Simmons, 38 Ill. 242; Illinois, etc., R. Co. v. Slatton, 54 Ill. 133; Ohio, etc., R. Co. v. Shonefelt, 47 Ill. 497; Chicago, etc., R. Co. v. Cass, 73 Ill. 394; Kepperly v. Ramsden, 83 Ill. 354.

If it was not shown that the plaintiff did not use ordinary care, or if it was shown that he did not, then the rule of comparative negligence had no place in the case. Garfield Mfg. Co. v. McLean, 18 Ill. App. 447; Chicago, etc., R. Co. v. Thorson, 11 Ill. App. 631; Chicago, etc., R. Co. v. Rogers, 17 Ill. App. 638; Chicago, etc., R. Co. v. White, 26 Ill. App. 586; Chicago, etc., R. Co. v. Flint, 22 Ill. App. 502; Chicago, etc., R. Co. v. Dougherty, 12 Ill. App. 181; Union, etc., Co. v. Kollaher. 12



§ 69. **Failure to exercise ordinary care more than slight negligence.**—"The word 'diligence,' as used in the definitions of the degrees of negligence to which we have referred," said Justice Scholfield of Illinois, "is synonymous with 'care.' This is shown by the text in Story immediately following the definitions quoted.<sup>54</sup> It is there said: 'For he who is only less diligent than very careful men, cannot be said to be more than slightly inattentive; he who omits ordinary care, is a little more negligent than men ordinarily are; and he who omits even slight diligence, falls in the lowest degree of prudence, and is deemed grossly negligent.' It can not, then, be legally true, that where the plaintiff fails to exercise ordinary care, and the defendant is guilty of negligence only, the plaintiff's negligence is slight and that of the defendant gross in comparison with each other."<sup>55</sup>

§ 70. **Ordinary and slight negligence in their popular sense.**—"Giving the words their popular sense, it would rather seem that ordinary negligence would be such negligence as men of common prudence indulge in, which betokens only the exercise of ordinary care, and not the want of ordinary care, as is suggested. This, where the law requires only

Ill. App. 400; Wabash, etc., R. Co. v. Moran, 13 Ill. App. 72; Union, etc., Co. v. Monaghan, 13 Ill. App. 148; Toledo, etc., R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846.

But the plaintiff did not have to exercise the highest degree of care. Chicago, etc., R. Co. v. Payne, 59 Ill. 534; Terre Haute, etc., R. Co. v. Voelker, 31 Ill. App. 314.

It was error to say to the jury that the plaintiff could not recover unless they "believe from the evidence that the injury complained of was caused by the negligence of the defendant, and the plaintiff was without fault," for

that was stronger than the law justified, being an ignoring of the doctrine of comparative negligence. Ohio, etc., R. Co. v. Porter, 92 Ill. 437.

<sup>54</sup> "The definition of gross negligence itself proves that it is not intended to be the subject of comparison. It is 'the want of slight diligence.' Slight negligence is 'the want of great diligence,' and intermediate, then, is ordinary negligence, which is defined to be 'the want of ordinary diligence.'" Story on Bailments, Sec. 17.

<sup>55</sup> Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

ordinary care, is not negligence at all, for in law negligence is always faulty. It is the failure in some degree to use that care which the law requires under the circumstances. In a case where the law demands only the use of ordinary care, and ordinary care is actually exercised, there is in law no negligence whatever. In such case it is not true that the want of great diligence is in law slight negligence. In the popular sense of the words, slight negligence is a slight want of the care which the circumstances demand. A man obviously, therefore, may in such case fail slightly to use ordinary care, and in the popular sense of the words he would be guilty of slight negligence, and only slight negligence, and this, although he did not do all that ordinary care required. And so of 'gross negligence.' Its popular meaning is a very great failure to use the care which the law requires. It is not essential to gross negligence that there shall be an utter want of care, or, in the language of Story,<sup>56</sup> 'the want of' even 'slight diligence.' The exercise of slight diligence, where the highest degree of care is by law required, may still leave the party guilty of gross negligence—that is, guilty of a very great failure to exercise the highest care."<sup>57</sup>

**§ 71. Mere preponderance of defendant's negligence not sufficient—Defendant's clearly exceeding plaintiff's negligence.**—The mere fact that the defendant's negligence exceeds that of the plaintiff's did not enable the plaintiff to recover. It was only where his negligence was slight as compared with that of the defendant's. "But he cannot recover unless the negligence of the defendant clearly and largely exceeds his." "Under the instruction given,<sup>58</sup> although

<sup>56</sup> Story on Bailments, Sec. 17, is referred to.

<sup>57</sup> Justice Dickey, in his dissenting opinion, in Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

<sup>58</sup> "Even though the jury should believe, from the evidence, that the said Horace Clark was, at the

time in question, guilty of some slight negligence either in the management of his team, or in his efforts to escape contact with the engine, still, if they further believe, from the evidence, that the negligence of the railway company, at said time, clearly ex-

there may have been but slight negligence on the part of the company, and some negligence on the part of the deceased, still, if the negligence of the company clearly exceeded that of deceased, although in the smallest degree, plaintiff might recover. Or, under a case where there is gross negligence on the part of both plaintiff and defendant, still, if that of the defendant was clearly, though in the slightest degree, the greater, a recovery could be had under such instruction. This has not been announced by this court as the law, in any case, and to do so would be unreasonable, and work great injustice and wrong. It is not the law, and hence cannot be sanctioned as such. \* \* \* We have no doubt this instruction misled the jury in their finding, and it should not have been given.”<sup>59</sup>

§ 72. **Gross and slight negligence distinguished.**—In 1882 the Supreme Court undertook to distinguish “gross” and “slight” negligence by instituting a comparison between them. “In holding that the plaintiff may recover,” said that court, “in an action for negligence, notwithstanding he has been guilty of contributive negligence, where his negligence is but slight and that of the defendant gross in comparison

ceeded any negligence, if such negligence has been proven, of said Clark, and was the immediate cause of his death, then the jury must find the railway company guilty.”

<sup>59</sup> Chicago, etc., R. Co. v. Clark, 70 Ill. 276; Illinois Cent. R. Co. v. Backus, 55 Ill. 379; Chicago, etc., R. Co. v. Gretzner, 46 Ill. 83; Illinois, etc., R. Co. v. Triplett, 38 Ill. 485.

This instruction was held erroneous: “The court further instructs the jury that if they believe, from the evidence, that Gilbert H. Dimick was killed by the defendant’s locomotive engine and

train while he was traveling upon a highway which crossed the defendant’s railroad there, although the jury may believe, from the evidence, that the deceased was himself guilty of some negligence which may have, in some degree, contributed to the injury, yet, if the jury further believe, from the evidence, that the negligence of the defendant was of a higher degree, or so much greater than that of the deceased that that of the latter was slight in comparison, the plaintiff is entitled to recover in this action.” Chicago, etc., Ry. Co. v. Dimick, 96 Ill. 42.

with each other, it must, of course, be understood the terms 'slight negligence' and 'gross negligence' are used in their legal sense, as defined by common law judges and text writers, for otherwise the terms would convey no idea of a definite legal rule. As defined by those judges and writers, these terms express the extremes of negligence. Beyond gross and slight there are no degrees of negligence. 'Gross gross,' 'grosser gross,' and 'grossest gross,' and 'slight slight,' 'slighter slight,' and 'slightest slight,' are absurd, and, in a legal sense, impossible terms. What is less than slight negligence the law takes no cognizance of as a ground of action, and beyond gross negligence the law, while recognizing there may be liability for a trespass because of a particular intention to do wrong, or of a degree of willful and wanton recklessness which authorizes the presumption of a general intention to do wrong, recognizes no degree of negligence. The definition of gross negligence itself proves that it is not intended to be the subject of comparison. It is, 'the want of slight diligence.' Slight negligence is, 'the want of great diligence,' and intermediate there is ordinary negligence, which is defined to be 'the want of ordinary diligence.' " 60

" Chicago, etc., R. Co. v. Johnson, 103 Ill. 512, citing Story on Bailments, Sec. 17; Shearman & Redfield on Negligence (2d Ed.), Secs. 16, 17; Cooley on Torts, 631, and Central Military Tract. R. Co. v. Rockefeller, 17 Ill. 541.

The opinion was delivered by Justice Scholfeld; and while Justice Dickey concurred therein, he did not concur in that part above quoted, saying that Justice Story in his treatise on Bailments, had not used the terms "gross negligence" and "slight negligence" in the sense or in the meaning in which they had been used in the previous Illinois case; "nor does he give the meaning which would

naturally be adopted by a jury in giving effect to an instruction given by the court." "Nor do I concur in the *dicta* which say there are and can be no degrees in gross negligence, and no degrees in slight negligence. The adjectives 'slight' and 'gross' seem to me to be capable of comparison, as most adjectives are. I see no absurdity in saying 'gross,' 'more gross,' 'most gross,' or 'gross,' 'grosser,' 'grossest,' or 'slight,' 'more slight,' 'slightest.' In fact, in the quotation from Story [Story on Bailments, Sec. 17] he speaks of 'infinite shades of care,' from the 'slightest' momentary thought to the 'most vig-



§ 73. **Plaintiff's negligence must be compared with that of the defendant.**—The quotations made show that the comparison to be instituted must have been the negligence of the plaintiff compared with that of the defendant; and not a comparison of the plaintiff's negligence with what an ordinarily prudent and careful man would have done under the particular circumstances; nor could the defendant's conduct be compared with what an ordinarily prudent and careful man would have done under like circumstances. The negligence of plaintiff had to be compared with that of the defendant; and that was where the name of "Comparative Negligence" had its origin. If the plaintiff's negligence contributed to the injury, then before he could recover it had to appear that his negligence was slight in comparison with that of the defendant's, which had to be gross.<sup>61</sup> And an in-

ilant solicitude.' In fact, the imperfection of these definitions of Story leads Cooley, in his work on Torts, p. 630, to say of this classification, that it 'only indicates that under the special circumstances great care or caution was required, or only ordinary care, or only slight care,' and to add, 'if the care demanded was not exercised, the case is one of negligence.' The terms 'slight negligence' or 'moderate negligence,' or 'gross negligence,' do not indicate offenses of a different nature, but different degrees in offenses of the same nature. I think, therefore, there may be cases in which it may be legally true that the plaintiff has failed in *some degree* to exercise ordinary care, and that in the same case the defendant has been guilty of gross negligence, wherein the plaintiff's negligence may be slight—that is, may consist of a slight failure to use ordinary care—and that of

the defendant gross in comparison therewith. To my mind the proposition that a plaintiff's negligence is slight, is not compatible with the proposition that he has failed in some degree to use ordinary diligence."

<sup>61</sup> Chicago, etc., R. Co. v. Fiet-sam, 123 Ill. 518; 15 N. E. Rep. 169; Lake Shore, etc., R. Co. v. Johnson, 135 Ill. 641; 26 N. E. Rep. 510; Willard v. Swanson, 126 Ill. 381; 18 N. E. Rep. 548; Village of Jefferson v. Chapman, 127 Ill. 438; 20 N. E. Rep. 33; Jacksonville, etc., R. Co. v. Southworth, 135 Ill. 250; 25 N. E. Rep. 1093; Christian v. Erwin, 125 Ill. 619; 17 N. E. Rep. 707; Chicago, etc., R. Co. v. Johnson, 116 Ill. 206; 4 N. E. Rep. 381; Toledo, etc., R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846; Chicago, etc., Ry. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. Rep. 15; Chicago, etc., R. Co. v. Longley, 2 Ill. App. 505; City of Winchester v. Case, 5 Ill.



struction which required the jury to find whether the negligence of the plaintiff was slight and that of the defendant was gross, but did not require them to compare the negligence of the respective parties, and determine from such comparison whether the one was slight and the other gross, was erroneous.<sup>62</sup> If the plaintiff were guilty of gross negligence, then he could not recover,<sup>63</sup> and it was even said that if he were guilty of negligence contributing to the injury, he could not recover.<sup>64</sup> If both were equally negligent, there could be no recovery.<sup>65</sup> Nor was there any middle ground between slight and gross negligence, the courts refusing to recognize any degrees of negligence. Comparative negligence, it was said, did not authorize the jury to weigh the degrees of negligence and find for the party least in fault.<sup>66</sup> Of the rule one of the appellate courts of the

App. 486; *Wabash Ry. Co. v. Jones*, 5 Ill. App. 607; *North Chicago, etc., R. Co. v. Monka*, 4 Ill. App. 664; *Illinois Central R. Co. v. Brookshire*, 3 Ill. App. 225; *Chicago, etc., R. Co. v. Krueger*, 124 Ill. 457; 17 N. E. Rep. 52; affirming 23 Ill. App. 639; *Chicago, v. Stearns*, 105 Ill. 554; *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133.

<sup>62</sup> *Chicago, etc., R. Co. v. Dillon*, 17 Ill. App. 355; *Moody v. Peterson*, 11 Ill. App. 180; *Pittsburg, etc., Ry. Co. v. Shannon*, 11 Ill. App. 222; *Union Ry., etc., Co. v. Kollaher*, 12 Ill. App. 400; *Chicago, etc., R. Co. v. O'Connor*, 13 Ill. App. 62.

<sup>63</sup> *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576.

<sup>64</sup> *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133. But this is qualified in a later case. *Chicago, etc., R. Co. v. Krueger*, 23 Ill. App. 639; 124 Ill. 457; 17 N. E. Rep. 52.

<sup>65</sup> *Illinois Cent. R. Co. v. Backus*, 55 Ill. 379; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Murray*, 62 Ill. 326; *Ohio, etc., R. Co. v. Eaves*, 42 Ill. 288; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576.

"If both parties are equally in fault, or nearly so, the rule is the same." *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510.

<sup>66</sup> *Wabash Ry. Co. v. Jones*, 5 Ill. App. 606; *North Chicago, etc., Co. v. Monka*, 4 Ill. App. 664; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510.

"It never was the law in this state that the negligence of the parties to a controversy upon that object would be weighed in a scale, where, if it inclined at all in favor of the plaintiff, he might recover against the defendant. Nor, it is believed, has such a rule ever been established by a court of recognized authority, that if the negligence of the plaintiff in a case of this kind [a defective town bridge] is a shade less than

state said: "The rule of comparative negligence requires and has always required much more than a mere preponderance of negligence on the part of the defendant to authorize a recovery. When the plaintiff is chargeable with contributory negligence, though slight, there must be a wide disparity between his negligence and that of the defendant before he can recover."<sup>67</sup> Gross negligence on the part of the defendant did not excuse the plaintiff from the use of ordinary care.<sup>68</sup> The burden was on the plaintiff to not only show that the defendant's negligent conduct caused the injury, but he had also the burden to show that he was free from negligence or else that his own negligence was slight in comparison with that of the defendant.<sup>69</sup> In

that of the defendant, he may be allowed to recover." *Provident, etc., v. Carter*, 2 Ill. App. 34.

"The doctrine of comparative negligence is founded upon a comparison of the negligence of the plaintiff's with that of the defendant's. This element of comparison is of the very essence of the rule. It must not only appear that the negligence of the plaintiff is slight and that of the defendant gross, but also that they are so when compared with each other." *Moody v. Peterson*, 11 Ill. App. 180.

This instruction has been held to be correct: "If they find, from the evidence, that the plaintiff was guilty of some negligence, but that the defendant was guilty of gross negligence contributing to such injury, and that the plaintiff's negligence was slight as compared with the negligence of the defendant, still she may be entitled to recover." *City of Chicago v. Stearns*, 105 Ill. 554.

See generally on the subject of this section, *Chicago, etc., R. Co.*

*v. Triplett*, 38 Ill. 482; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Terre Haute, etc., R. Co. v. Voelker*, 31 Ill. App. 314; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Chicago, etc., R. Co. v. Hogarth*, 38 Ill. 370.

The capacity of plaintiff had to be considered in determining the degree of his negligence. *Kerr v. Forque*, 54 Ill. 482.

<sup>67</sup> *Parmelee v. Farro*, 22 Ill. 467; *Peoria, etc., Ry. Co. v. Miller*, 11 Ill. App. 375; *Springfield, etc., Ry. Co. v. DeCamp*, 11 Ill. App. 475.

<sup>68</sup> *Toledo, etc., R. Co. v. Cline*, 135 Ill. 41; 25 N. E. Rep. 846; *Chicago, etc., Ry. Co. v. Dunleavy*, 129 Ill. 132; 22 N. E. Rep. 15.

<sup>69</sup> *Chicago, etc., R. Co. v. Hazard*, 26 Ill. 373; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Chicago, etc., R. Co. v. Simmons*, 38 Ill. 242; *Illinois, etc., R. Co. v. Slatton*, 54 Ill. 133; *Ohio, etc., R. Co. v. Shonefelt*, 47 Ill. 497; *Chi-*

view of these distinctions and requirements, one of the appellate courts was justified in its use of the following statement concerning negligence as administered in the courts of Illinois: "The doctrine of comparative negligence, as applied to cases where the injury is not willful, seems to be shorn of all practical meaning. A plaintiff can in no case recover unless he has used ordinary care, no matter how gross the negligence of the defendant, while if he used ordinary care, his whole duty has been performed, and a comparison of his conduct with that of the defendant as to the question of negligence would seem useless."<sup>70</sup>

#### § 74. Plaintiff's negligence compared with defendant's.—

Slight negligence on the part of the plaintiff, in comparison with that of the defendant's, did not defeat the plaintiff in his cause of action. In determining whether or not the negligence of the plaintiff had been slight, that of the defendant had first to be ascertained, and then the comparison be made. It is readily seen that the same negligence of the plaintiff

cago, etc., R. Co. v. Cass, 73 Ill. 394; Kepperly v. Ramsden, 83 Ill. 354.

<sup>70</sup> Illinois Central R. Co. v. Trowbridge, 31 Ill. App. 190.

Referring to an instance where the deceased's negligence had been slight and that of the defendant reckless, the Supreme Court said of such deceased's conduct. "His carelessness may have been induced by the presumption that those persons [defendant's employes] would do their duty." Chicago, etc., R. Co. v. Triplett, 38 Ill. 482; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510.

"Gross negligence is the want of slight care." Chicago, etc., R. Co. v. Johnson, 103 Ill. 512.

Where a passenger on a railroad car permitted his arm to rest on

the base of the car window, and slightly project outside, and thereby had his arm broken in passing a freight train on an adjoining track, his negligence was held slight as compared with that of the railroad company in permitting its freight cars to stand so near the track of its passenger train, and he could recover for his injuries. Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333.

Slight negligence is not slight want of ordinary care, but merely want of extraordinary care, and did not prevent a recovery. Griffin v. Willow, 43 Wis. 509; Dreher v. Fitchburg, 22 Wis. 675; Ward v. Milwaukee, etc., Ry. Co. 29 Wis. 144; Hammond v. Mukwa, 40 Wis. 35.

in one instance might be slight negligence, while in another it would be more than slight, and defeat him. "Although the plaintiff may be guilty of some degree of negligence, yet if it is but slight as compared with that of the defendant, the plaintiff shall be allowed to recover."<sup>71</sup> "This rule applies even where the slight negligence of the plaintiff in some degree contributed to the injury."<sup>72</sup> In a subsequent case, in reviewing the doctrine as announced in Jacob's case,<sup>73</sup> it was said: "That the question of liability did not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties, for all care or negligence is, at best, but relative, the absence of the highest possible degree of care, showing the presence of some negligence, slight as it may be. The true doctrine, therefore, this court thought was, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff. The degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, the plaintiff shall not be deprived of his action."<sup>74</sup>

<sup>71</sup> *Coursen v. Ely*, 37 Ill. 338.

<sup>72</sup> *Coursen v. Ely*, 37 Ill. 338.

<sup>73</sup> *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478.

<sup>74</sup> *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325.

"No inflexible rule can be laid down. Each case must depend upon its own circumstances." *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 482; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Coursen v. Ely*, 37 Ill. 338; *Chicago, etc., R. Co. v. Hogarth*, 38 Ill. 370; *Illinois Central R. R. Co. v. Simmons*, 38 Ill. 242; *St. Louis, etc., R. Co. v. Todd*, 36 Ill. 409; *Chicago, etc., R. Co. v. Pondrom*,

51 Ill. 333; *Illinois Cent. R. Co. v. Backus*, 55 Ill. 379; *Chicago, etc., R. Co. v. Dignan*, 56 Ill. 487; *Chicago, etc., R. Co. v. Gravy*, 58 Ill. 83; *Chicago, etc., R. Co. v. Dunn*, 61 Ill. 384; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499; *Illinois, etc., R. Co. v. Middlesworth*, 43 Ill. 64; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Toledo, etc., Ry. Co. v. Spencer*, 66 Ill. 528; *Illinois Cent. R. Co. v. Maffit*, 67 Ill. 431; *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534; *Chicago, etc., R. Co. v. Van Paten*, 64 Ill. 510; *Peoria Bridge, etc., v. Loomie*, 20 Ill. 236; *Ohio, etc., R. Co. v. Shonefelt*, 47 Ill.

§ 75. **Willful injury by defendant—Slight negligence of plaintiff.**—"The rule of this court is, that negligence is relative, and that a plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable, if he has been guilty of a higher degree of negligence, amounting to willful injury. The fact that a plaintiff is guilty of a slight negligence, does not absolve the defendant from the use of care and all reasonable efforts to avoid the injury. The negligence of the plaintiff does not license the defendant to wantonly or willfully destroy the plaintiff's property. Each party must be held to the use of all reasonable efforts to avoid the injury, and the negligence of one party does not absolve the other from diligence and caution."<sup>75</sup>

§ 76. **Mere preponderance of negligence against defendant not sufficient.**—Mere preponderance of negligence on the part of the defendant over that of the plaintiff's did not authorize the plaintiff to recover; and to say to the jury that the plaintiff might recover if the plaintiff's negligence were less than that of the defendant was error, for that authorized a recovery even if the defendant's negligence merely preponderated over that of the plaintiff. For the plaintiff could recover only where his negligence was slight in comparison with that of the defendant's negligence.<sup>76</sup>

497; Chicago, etc., R. Co. v. Murray, 62 Ill. 326; Pittsburg, etc., R. Co. v. Knutson, 69 Ill. 103; Rockford, etc., R. Co. v. Hillmer, 72 Ill. 235; Chicago, etc., R. Co. v. Mock, 72 Ill. 141; Keokuk Packet Co. v. Henry, 50 Ill. 264; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Toledo, etc., Ry. Co. v. McGinnis, 71 Ill. 346; Chicago, etc., R. Co. v. Cass, 73 Ill. 394; Chicago, etc., R. Co. v. Donahue, 75 Ill. 106; Toledo, etc., Ry. Co. v. O'Connor, 77 Ill. 391; Kewanee v. Depew, 80 Ill. 119; Schmidt v.

Chicago, etc., R. Co. 83 Ill. 405.

<sup>75</sup> St. Louis, etc., R. Co. v. Todd, 36 Ill. 409; Peoria, etc., R. Co. v. Champ, 75 Ill. 577.

<sup>76</sup> Chicago, etc., R. Co. v. Dunn, 61 Ill. 385; Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313; Illinois Cent. R. Co. v. Moffit, 67 Ill. 431; Chicago, etc., R. Co. v. Van Patten, 64 Ill. 510; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Chicago, etc., R. Co. v. Lee, 60 Ill. 501; Chicago, etc., R. Co. v. Mock, 72 Ill. 141.



§ 77.—**Jury must compare the negligence of the defendant with that of the plaintiff.**—It was for the jury to determine whether the plaintiff's negligence was slight in comparison with that of the defendant, or whether it was equal or greater. They had to compare the degrees of negligence. And it was proper to instruct the jury that if the plaintiff had been guilty of unreasonable negligence, and the defendant guilty of gross negligence, they should find for the latter.<sup>77</sup> And an instruction limiting a recovery to the negligence of the defendant and freedom of the plaintiff from negligence materially contributing to the injury, was erroneous; for it kept out of view the rule of comparative negligence.<sup>78</sup> "The gross negligence of the defendant is as indispensable an element as the slight negligence of the deceased; and it appearing from the evidence that there is contributive negligence on the part of the plaintiff or the deceased, it is for the jury to determine, from all the evidence, the relative degrees of the negligence of the parties, and unless they be satisfied that of the plaintiff or deceased is slight and that of the defendant gross in comparison with each other, there can be no recovery. The onus, in establishing the relative degrees of negligence, is not thrown on the defendant."<sup>79</sup> Neither party, in the first instance, is assumed to have been negligent. The negligence must be proved, and unless it appears from the proof that the plaintiff's care, under all the evidence, is proved as alleged, there can be no recovery."<sup>80</sup>

§ 78. **Instructions must require comparison.**—Care had to be used instructing the jury that the defendant's negli-

<sup>77</sup> Illinois Central R. Co. v. Mid-  
dlesworth, 43 Ill. 64. Chicago,  
etc., R. Co. v. Payne, 59 Ill. 534;  
Chicago, etc., R. Co. v. Lee, 60  
Ill. 501; Illinois Central R. Co. v.  
Cragin, 71 Ill. 177; Schmidt v.  
Chicago, etc., R. Co. 83 Ill. 405.

<sup>78</sup> Schmidt v. Chicago, etc., R.  
Co. 83 Ill. 405; Illinois, etc., R.  
Co. v. Hetherington, 83 Ill. 510.

<sup>79</sup> Citing Indianapolis, etc., R.  
Co. v. Evans, 88 Ill. 63.

<sup>80</sup> Chicago, etc., R. Co. v. Har-  
wood, 90 Ill. 425; Chicago, etc., R.  
Co. v. Dimick, 96 Ill. 42; Chicago,  
etc., R. Co. v. Triplett, 38 Ill. 482;  
City of Chicago v. Stearns, 105  
Ill. 554.

gence must be "gross" in order to enable the plaintiff to recover whether his negligence was slight. "The jury must be told, to authorize a recovery, it must appear, from the evidence, that the negligence of the plaintiff is slight and that of the defendant's gross, in comparison with each other, and it will not be sufficient simply to say the plaintiff may recover, though negligent, provided his negligence is slight in comparison with that of the defendant."<sup>81</sup>

**§ 79. Illustration—Engine striking hand car—Unlawful speed.**—A case of collision of a hand car and an engine, illustrates somewhat the rule of comparative negligence. The collision took place in a city, and at the time the engine was running at a speed prohibited by an ordinance, and no bell was rung or whistle sounded. The laborer was on the hand car, which those in charge of it had been in the habit of bringing into the city at the hour of the accident. The approach of the engine was concealed from the view of those on the hand car on account of a curve, and trees and buildings. It was held that the negligence of the railroad company was gross, and that of the deceased, if any, was slight.<sup>82</sup>

**§ 80. Illustration—Mail crane striking fireman.**—A fireman on a railroad locomotive while passing a station in the night time was killed by coming in contact with a mail

<sup>81</sup> Chicago, etc., R. Co. v. Harwood, 90 Ill. 425; Illinois Cent. R. Co. v. Hammer, 72 Ill. 351; Union, etc., Co. v. Monaghan, 13 Ill. App. 148; Christian v. Erwin, 22 Ill. App. 534.

An instruction which required the jury to find whether the negligence of the plaintiff was slight and that of the defendant gross, but did not require them to compare the negligence of the respective parties, and determine from such comparison whether the one was slight and the other gross,

was erroneous. Chicago, etc., R. Co. v. Dillon, 17 Ill. App. 355; Moody v. Peterson, 11 Ill. App. 180; Pittsburg, etc., Ry. Co. v. Shannon, 11 Ill. App. 222; Union, etc., Ry. Co. v. Kolleher, 12 Ill. App. 400; Chicago, etc., R. Co. v. O'Connor, 13 Ill. App. 62. As to practice in Illinois in giving instructions concerning comparative negligence, see Chicago, etc., Ry. Co. v. Dimick, 96 Ill. 42.

<sup>82</sup> Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391.

crane or catcher near the main track. He was looking out for signals when struck. Two other accidents had previously occurred from the same cause, both of which the company had notice. It was held that the company was guilty of gross negligence; and there might be a recovery even if the fireman had been guilty of negligence in leaning out from the sideway while looking for signals, his negligence in that regard being slight in comparison with that of the company.<sup>83</sup>

**§ 81. Admiralty suits—Apportionment of damages.**—The strict rules of the common law do not apply to suits in admiralty to recover damages for injuries inflicted. Admiralty courts have always refused to be bound by the rules of that law with respect to contributory negligence. Where both parties have been guilty of negligence, the damages are apportioned between them, usually divided equally, so that the plaintiff or defendant will recover only one-half the amount of damages he has suffered.<sup>84</sup> While the general rule is to give the

<sup>83</sup> Chicago, etc., R. Co. v. Gregory, 58 Ill. 272.

<sup>84</sup> The Schooner Catharine, 17 How. 170; 15 L. Ed. 233; *Petersfield v. The Judith*, Abbott on Shipping, 231; *The Celt*, 3 Hagg. 328*n*; *The Washington*, 5 Jurist, 1067; *The Fiends*, 4 E. F. Moore, 314, 322; *The Seringapatam*, 5 N. of C. 61, 66; *Vaux v. Salvador*, 4 Ad. & El. 431; *The Monarch*, 1 Wm. Rob. 21; *The Dr. Cock*, 5 Mon. L. Mag. 303; *The Oratava*, 5 Mon. L. Mag. 45, 362; *Atlee v. Packet Co.* 21 Wall. 389; 22 L. Ed. 619, reversing 2 Dill, 479; Fed. Cas. No. 10341; *The City of Carlisle*, 39 Fed. Rep. 807; *The City of Alexandria*, 17 Fed. Rep. 390; *Anderson v. The Ashbrooke*, 44 Fed. Rep. 124; *The Serapis*, 49 Fed. Rep. 393; *The Wanderer*, 51 Fed. Rep. 140; *The Explorer*, 21

Fed. Rep. 135; *The Max Morris*, 24 Fed. Rep. 860 (affirmed, 28 Fed. Rep. 881); *The Daylesford*, 30 Fed. Rep. 633; *The Joseph Stickney*, 31 Fed. Rep. 156; *The Lackawanna*, 151 Fed. Rep. 499; *The Max Morris*, 137 U. S. 1; 11 Sup. Ct. Rep. 29; *Rogers v. Steamer St. Charles*, 19 How. 108; 15 L. Ed. 563; *Chamberlain v. Ward*, 21 How. 548; 16 L. Ed. 211; affirming Fed. Cas. No. 17,151; *The Washington*, 9 Wall. 513; 19 L. Ed. 787; *The Sapphire*, 11 Wall. 164; 20 L. Ed. 127; *The Ariadne*, 13 Wall. 475; 20 L. Ed. 542; reversing 7 Blatchf. 211; Fed. Cas. No. 525; *The Continental*, 14 Wall. 345; 20 L. Ed. 801; reversing 8 Blatchf. 33; Fed. Cas. No. 3,141; *The Teutonia*, 23 Wall. 77; 23 L. Ed. 44; *The Sunnyside*, 91 U. S. 208; 23 L. Ed.

plaintiff only half his damages when he contributed to the injury, yet the rule is not an inflexible one as to the amount, and only a third has been allowed, interpreting the rule for a division according to the respective fault of the parties.<sup>85</sup> Even gross fault does not change the general rule.<sup>86</sup> This rule has been applied to cases of personal injury of seamen after an exhaustible examination of the question.<sup>87</sup>

302; reversing *Brown*, Ad. Cas. 227; Fed. Cas. No. 13,620; *The America*, 92 U. S. 432; *The Juniata*, 93 U. S. 337; 23 L. Ed. 930; *The Stephen Morgan*, 94 U. S. 599; 23 L. Ed. 930; *The Virginia Ehrman*, 97 U. S. 309; 24 L. Ed. 890; *The City of Hartford*, 97 U. S. 323; 24 L. Ed. 930; 11 Blatchf. 72; Fed. Cas. No. 2,752; *The Civilta*, 103 U. S. 699; 26 L. Ed. 599; 6 Ben. 309; Fed. Cas. No. 2,775; *The Connecticut*, 103 U. S. 710; 26 L. Ed. 467; *The North Star*, 106 U. S. 17; 1 Sup. Ct. Rep. 41; affirming 8 Blatchf. 209; Fed. Cas. No. 10,331; *The Sterling*, 106 U. S. 647; 1 Sup. Ct. Rep. 89; 27 L. Ed. 98; *The Manitoba*, 122 U. S. 97; 7 Sup. Ct. Rep. 1158; 90 L. Ed. 1095; *The Columbia*, 27 Fed. Rep. 238; *The James D. Leacy*, 110 Fed. Rep. 685 (affirmed, 113 Fed. Rep. 1019; 51 C. C. A. 620); *The Providence*, 98 Fed. Rep. 133; 38 C. C. A. 670; *The New York*, 175 U. S. 187; 20 Sup. Ct. Rep. 67; 44 L. Ed. 126, reversing 27 C. C. A. 154; 54 U. S. App. 248; 82 Fed. Rep. 819; *Steam Dredge No. 1*, 134 Fed. Rep. 161; 67 C. C. A. 67; 69 L. R. A. 293 (denying the applicability of the doctrine of *Davies v. Mann*, 10 Mes. & Wils. 546); *The William Murtagh*, 17 Fed. Rep. 259; *The Bordentown*, 16 Fed. Rep. 270; *The Jeremiah Godfrey*, 17 Fed. Rep. 738; *The Monticello*, 15

Fed. Rep. 474; *The B. & C.*, 18 Fed. Rep. 543; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Syracuse*, 18 Fed. Rep. 828; *Memphis, etc., Co. v. Yager, etc., Co.* 10 Fed. Rep. 395; *Mason v. Steam Tug*, 3 Fed. Rep. 404; *The William Cox*, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342; *The David Dowe*, 16 Fed. Rep. 154; *Christian v. Van Tassel*, 12 Fed. Rep. 884, 890; *The Explorer*, 20 Fed. Rep. 140; *The E. B. Ward*, 20 Fed. Rep. 702; *The Mabel Comeaux*, 24 Fed. Rep. 490; *The Mystic*, 44 Fed. Rep. 399; *The Frank and Willie*, 45 Fed. Rep. 405; *The Nathan Hale*, 48 Fed. Rep. 700; *The Julia Fowler*, 49 Fed. Rep. 279; *The Serapis*, 49 Fed. Rep. 396; *The J. & J. McCarthy*, 55 Fed. Rep. 86; *The Cyprus*, 55 Fed. Rep. 333; *Wm. Johnson & Co. v. Johnson*, 86 Fed. Rep. 888; *The Lackawanna*, 151 Fed. Rep. 499.

<sup>85</sup> *The Mary Ida*, 20 Fed. Rep. 741.

<sup>86</sup> *The Pegasus*, 19 Fed. Rep. 46; *The Maria Martin*, 12 Wall. 31; 20 L. Ed. 251; affirming 2 Biss. 41; Fed. Cas. No. 9,079.

<sup>87</sup> *Olson v. Flavel*, 34 Fed. Rep. 477 (distinguishing *The Clarendon*, 6 Sawy. 544; 4 Fed. Rep. 649, and *Holmes v. Railway Co.* 6 Sawy. 262; 5 Fed. Rep. 523); *The Max Morris*, 137 U. S. 1; 11 Sup. Ct. Rep. 29; 34 L. Ed. 586;



§ 82. **Origin of admiralty rule.**—"The rule of admiralty in collisions," said Judge Wallace, "apportioning the loss in case of mutual fault, is peculiar to the maritime law. It is not derived from the civil law, which agrees with the common law in not allowing a party to recover for the negligence of another where his own fault has contributed to the

affirming 24 Fed. Rep. 860, and 28 Fed. Rep. 881. See *The Daylesford*, 30 Fed. Rep. 633; *The Joseph Stickney*, 31 Fed. Rep. 156.

"We think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." *Schooner Catharine v. Dickinson*, 17 How. 170; 15 L. Ed. 233; *The Mary Patten*, 2 Low. 196.

"As the Saxe thus contributed to the collision, I must hold her also in fault, and order the damages to be divided, and a decree will be entered accordingly." *The Ant*, 3 Fed. Rep. 294. See *Vessel Owners' Towing Co. v. Wilson*, 63 Fed. Rep. 630; 24 U. S. App. 49; *The Edward Luckenbach*, 94 Fed. Rep. 545; *Belden v. Chase*, 150 U. S. 691; 14 Sup. Ct. Rep. 269; 37 L. Ed. 1218, reversing 117 N. Y. 637; 22 N. E. Rep. 963; *The Victory*, 68 Fed. Rep. 400; 25 U. S. App. 271.

Senator Piles: "The rule of admiralty is this, as it has been decided by the Supreme Court of the United States: That if an injury occurs on board ship, or one which has relation to the courts of admiralty, the court divides the damages between the ship and the person who received the injury. It is not necessary that the master should have seen the accident; that he should have

stood there, or that any one representing the master of the ship was present. If the hold of the ship is left open, and a seaman on board that ship, through his own negligence, in the absence of the master, carelessly passes along the deck and falls into an unlighted hold or hatchway, he can recover damages against the ship in an action *in rem* for whatever he may be entitled to, deducting therefrom, as the court will, the amount the court thinks should be deducted by reason of his own negligence. In other words, the court will find in an admiralty case, under the circumstances I have stated, and altogether in the absence of the master, the amount of damages the complainant or libelant is entitled to. If it be \$10,000, and the court finds that one-half of that was the result of the libelant's own negligence, and the other half was the result of the negligence of the ship, the master or mate, then, on account of his own contributory negligence in the case, the court would deduct \$5,000 from the amount which the libelant otherwise would be entitled to recover. It does not necessitate the presence of any one on board the ship representing the ship, directing him to go into it to entitle him to recover." 60 Cong. Record, 1st Sess., p. 4536.



injury. It emanated from the ancient maritime codes and the reasons which are assigned by commentators as commending it are various and divergent. According to Clieroe,<sup>88</sup> 'this rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of dispute commonly follow where they cannot discover the motives of the parties, or where they see fault on both sides.' He thought its object was to prevent owners of old and worthless ships from getting them run down on purpose, in order to found a claim for excessive damage. Mr. Bell defends the rule upon expediency, 'because,' he says, 'there appears to be no sufficient protection, without some such rule, for weak ships against stronger and larger ships, the masters and crews of which will undoubtedly be more careless when they know that there is little risk of detection and none at all of direct damage to their vessel, by which a smaller ship may be run down without any injury to the assailant.' Lord Denman<sup>89</sup> says, 'It grows out of an arbitrary provision in the law of nations, from views of general expediency, not as dictated from natural justice, nor, possibly, quite consistent with it.' By the laws of most of the maritime states the rule was applied indiscriminately in collisions where both vessels were to blame, where neither was to blame, and when the blame could not be detected. In a recent article in the *Law Quarterly Review*,<sup>90</sup> Mr. Mersden traces the history of the recognition of the general maritime law on this subject by the English admiralty courts, and shows that in the earlier cases the rule of division of loss was applied where there was no fault in either ship, and when the cause of collision was uncertain, as well as in cases where both ships were in fault. Since *The Woodrop Sims* case<sup>91</sup> the rule has only been applied in the case of both ships in fault; and, as thus applied, is now adopted as a part of the general municipal law of England by the Judicature Act of 1873."<sup>92</sup>

<sup>88</sup> 1 Bell, *Comm.* (5th Ed.) 581.

<sup>89</sup> 2 Dods, 83.

<sup>90</sup> In *Devaux v. Salvador*, 4 Adal. & El. 420.

<sup>91</sup> *The Max Morris*, 24 Fed. Rep. 860; affirmed, 28 Fed. Rep. 881; and affirmed on appeal to the Su-

<sup>92</sup> July, 1886, Vol. 2, p. 362.

**§ 83. Rule in admiralty commended.**—This rule of the admiralty court has been commended by the Supreme Court of the United States in the following language: “But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceedings is in many respects different, and the rules of decisions are different. The mode of pleading is different, the proceedings more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common law court the defendant must pay all the damages or none. If there has been, on the part of the plaintiff, such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, where both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in securing practical justice, as the other; and the plaintiff, who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum. It is not intended to say that the principles which determine the existence of mutual fault, on which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for deter-

preme Court, 137 U. S. 1; 11 Sup. Ct. 29; 34 L. Ed. 586; affirming 28 Fed. Rep. 881; *The Wanderer*, 21 Fed. Rep. 140; *The Explorer*, 21 Fed. Rep. 135. The Statute of England referred to is Sub-div. 9, Sec. 25, Chap. 66 of 36 and 37 Vict. (L. R. 8, Stat. 321), and is as follows: “(9) In any

cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rule in force in the Courts of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.”

mining these questions, which may be in some respects the same, but in others vary materially."<sup>93</sup>

§ 84. **Difficulty of apportioning damages.**—In an early Kansas case Justice Brewer refers to the difficulty of apportioning the damages between the parties where both are guilty of negligence contributing to the injury. "Logically," says he, "the wrongdoer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation. This is not strictly justice. The wrongdoer causing the injury ought not to be released from making any compensation, simply because the injured

<sup>93</sup> *Atlee v. Packet Co.* 21 Wall. 389; 22 L. Ed. 619, reversing 2 Dill. 479; Fed. Cas. No. 10,341.

"In cases of marine torts, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law;" and "they have exercised a conscientious discretion upon the subject." Justice Story in *The Marianna Flora*, 11 Wheat. 1; 6 L. Ed. 405; affirming 3 Mason, 116; Fed. Cas. No. 9,080.

"The moiety rule in collision cases was adopted," said Justice Bradley, "for the better distribution of justice among mutual wrongdoers." *The Alabama*, 92 U. S. 695; 23 L. Ed. 763; reversing 11 Blatchf. 482; Fed. Cas. No. 123.

"Under the circumstances attending these disasters, in case of mutual fault, we think the rule dividing the loss the most just and equitable, and as best tending

to induce care and vigilance on both sides in navigation." *The Catharine*, 17 How. 170; 15 L. Ed. 233.

"The more equal distribution of justice, the dictates of humanity, the safety of life and limb, and the public good will, I think, be clearly best promoted by holding vessels liable to bear some part of the actual pecuniary loss, where their fault is clear, provided that the libellant's fault, though evident, is neither willful nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. Such a rule will certainly not diminish the care of laborers for their own safety, while it will surely tend to quicken the attention of the owners and masters of vessels towards providing all needful means for the safety of life and limb." *The Max Morris*, 24 Fed. Rep. 861; affirmed 137 U. S. 1; 11 Sup. Ct. Rep. 29; 35 L. Ed. 586; *The Scandinavia*, 156 Fed. Rep. 403.

party is also a wrongdoer, and helped to produce the injury. But many considerations, especially the difficulty of apportioning the damages and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized, that where the wrong, the negligence of both parties, contributes to the injury, the law will not afford relief."<sup>94</sup>

**§ 85. Assumption of risk.**—If the servant has assumed the risk in the performance of the act wherein he was injured, and the defendant is not otherwise negligent, then such servant cannot recover; and the doctrine of comparative negligence, or a division of damages in admiralty cases, has no place in the case.<sup>95</sup>

**§ 86. Contributory negligence does not prevent a recovery—How damages are apportioned.**—By examination of the cases cited in the foregoing sections it will be perceived that while the Georgia and Illinois cases are analogous, they are not strictly in point regarding the recovery of damages under the federal statutes where the plaintiff has been guilty of contributory negligence; for that statute lays down a rule that is broader and more liberal than those announced by either of these state courts or than is laid down by the several sections of the Georgia code when construed together. The federal statute allows a recovery in all cases where the plaintiff has been guilty of negligence and the defendant has likewise been guilty, both of their negligent acts joining and producing the injury. When that fact is ascertained, then the sole question is the proportion of the amount of damages he has suffered that the plaintiff is entitled to recover. It

<sup>94</sup> *Kansas Pacific Ry. Co. v. Pointer*, 14 Kan. 37.

<sup>95</sup> *The Scandinavia*, 156 Fed. Rep. 403; *The Saratoga*, 94 Fed. Rep. 221; 36 C. C. A. 208, reversing 87 Fed. Rep. 349; *The*

*Serapis*, 51 Fed. Rep. 92, 266; reversing 49 Fed. Rep. 393; *The Maharajah*, 40 Fed. Rep. 784; *The Henry B. Fiske*, 141 Fed. Rep. 188; *The Carl*, 18 Fed. Rep. 655.

is not a question of slight and gross negligence, as it was in Illinois; it is not a question of where the plaintiff's negligence began in order to constitute it contributory negligence, as in Georgia. The rule in admiralty approaches nearer the rule of this statute than of any of the decisions of the states; for there the damages are apportioned according to the respective faults of the two parties. Under the federal statute it becomes the duty of the court, if it is trying the case, or the jury if that is the method of trial, according to the Illinois rule, to compare the negligence of the plaintiff with that of the defendant, in order to determine the quantum of damages he is entitled to recover; and the comparison cannot be made with some standard outside the case. Of course, if the defendant has not been guilty of negligence, there can be no recovery; and that question must always be the most vital and the controlling one in the case. The assumption of the risk is another question to be considered. Neither of these two rules (except the failure to comply with the provision of the statute concerning safe appliances) have been either abrogated or in any wise changed. If the plaintiff's negligence was as great as that of the defendant, he recovers one-half of his damages. So he may recover if his negligence was greater than that of the defendant. But if he was not guilty of any negligence contributing to his injuries, then he recovers full damages; and in determining whether he was guilty of contributory negligence the entire facts, as disclosed by the evidence, must be considered. The court must apportion the damages, according to the relative amount of the negligence of the parties, or the jury must do likewise if it tries the case. Necessarily the court can lay down for the guidance of the jury only a general rule upon the subject. "For the apportionment of damages according to the relative fault of the parties," said the Supreme Court of Georgia, "there seems to be no standard more definite than the enlightened opinion of the jury."<sup>90</sup>

<sup>90</sup> Georgia, etc., Co. v. Neely,  
56 Ga. 580.

Some light may be gleaned  
from some Tennessee cases. See



§ 87. **Negligence of plaintiff necessary to concur with defendants to produce the injury.**—An interesting question is this: "Suppose the negligence of the plaintiff was necessary so that it might concur with that of the defendant's negligence in order to occasion the injury; can the plaintiff recover?" It would seem that the statute is broad enough to justify a recovery by the plaintiff of his damages. It is true that the plaintiff must have been guilty of negligence, else the injury would not have been occasioned; but it is also true that the defendant must have been guilty of negligence in order to occasion the injury. Plaintiff's negligence, therefore, was nothing more than contributory negligence of a grave character; and is such negligence as does not prevent a recovery on his part for some of his damages.<sup>96\*</sup>

§ 88. **Court cannot lay down exact rules for apportionment of damages.**—It is clear that courts cannot lay down rigid rules for the apportionment of the damages in a particular case. This is a fact that must be left to the jury, practically without directions. The remarks of Justice Cooley upon negligence in general throw some light upon

Nashville, etc., R. Co. v. Carroll, 6 Heisk. 347; *Duch v. Fitzhugh*, 21 Lea (Tenn.) 307; *Hill v. Nashville, etc., R. Co.* 9 Heisk. 823; *Smith v. Nashville, etc., R. Co.* 6 Heisk. 174; *Railroad Co. v. Walker*, 11 Heisk. 383; *Jackson v. Nashville, etc., R. Co.* 13 Lea, 491; 49 Am. Rep. 663; *Nashville etc., R. Co. v. Wheles*, 10 Lea, 471; 43 Am. Rep. 317; *Whirley v. White-man*, 1 Head, 610.

Erroneous notions that comparative negligence obtained in Kentucky has prevailed; but they are unfounded. See article of Helm Bruce, Esq., in *Kentucky Law Journal* for April, 1882, and *Kentucky, etc., R. Co. v. Thomas*, 79 Ky. 160; 42 Am. Rep. 208.

It remains to see whether the courts will accept the provisions of the section quoted at the beginning of this chapter in the

spirit in which they were enacted. It is to be feared they will not. "The reason why, in case of mutual, concurring negligence, neither party can maintain an action against the other," said Justice Strong, of Pennsylvania, "is not that the wrong of the one is set off against the wrong of the other; it is, that the law cannot measure how much the damages suffered is attributable to the plaintiff's own fault." *Heil v. Glanding*, 42 Pa. St. 499.

<sup>96\*</sup> Under the Wisconsin statute (Laws 1907, p. 495, c. 254) the negligence of the defendant railroad must be greater than that of the plaintiff in order that there may be a recovery where the plaintiff's negligence has contributed to the injury. *Zeratsky v. Chicago, M. & St. P. Ry. Co.* 141 Wis. 423; 123 N. W. 904.

the subject: "Negligence, as I understand it," says he, "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence, under all the existing circumstances, in view of the probable danger of injury. The danger is, therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the parties' conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under a given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons; it is only to be satisfactorily solved by the jury placing themselves in the position of the injured person and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."<sup>97</sup>

\**Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99, 118. See *Briggs v. Taylor*, 28 Vt. 183; *North Pennsylvania R. Co. v. Heileman*, 49 Pa. St. 60; *Bolton v. Frink*, 51 Conn. 342; 50 Am. Rep. 24; *Isbell v. New York, etc., R. Co.* 27 Conn. 393; *Meesel v. Lynn, etc., R. Co.* 8 Allen, 234; *Ireland v. Oswego, etc., R. Co.* 13 N. Y. 533; *Railroad Co. v. Stout*, 17 Wall. 657; 21 L. Ed. 745; affirming 2 Dill. 294; Fed. Cas. No. 13,504.

"The court could not say that one course or the other was the

more prudent, nor that the adoption of the more hazardous was, under all the circumstances, as a matter of law, contributory negligence." *Hawkins v. Johnston*, 105 Ind. 29; 4 N. E. Rep. 172; *Brazil, etc., Co. v. Hoodlet*, 129 Ind. 327; 27 N. E. Rep. 741; *Cleveland, etc., Ry. Co. v. Patterson*, 37 Ind. App. 617; 78 N. E. Rep. 681; *Stephens v. American, etc., Co.* 38 Ind. App. 414; 78 N. E. Rep. 335; *Columbus, etc., Co. v. Burke*, 37 Ind. App. 518; 77 N. E. Rep. 409.

§ 89. **Statute does not adopt a theory of slight, ordinary and gross negligence.**—Under the Wisconsin statute the defendant's negligence must be greater than that of the plaintiff's before there can be a recovery. If the negligence of both be equal, or that of the plaintiff the greater, there can be no recovery. In this respect it differs from the Federal statute; for under that statute, as we have observed, the plaintiff may recover although his negligence contributed more to the injury than that of the defendant. In one case it was contended that the Wisconsin statute called for the application of the old and now nearly obsolete rule of slight, ordinary, and gross negligence, and that such degrees of negligence should be observed in comparing as contributing causes the negligence of the railroad company and that of the injured person. But the Supreme Court of the state said: "We discover no such intent or provision in the law, nor do we claim it impracticable to have the jury judge whether the negligence of the injured person contributing to the cause of the injury is slighter or greater than that attributable to the company. Applying the statute to the case before us, we cannot accede to the defendant's claim that it would be mere speculation and guesswork for the jury to attempt to determine whether the plaintiff's contributory negligence was slighter or greater as a contributing cause than that of the defendant."<sup>97\*</sup>

§ 90. **Directing the verdict—Due care.**—The statute introduces new rules concerning the directing of the verdict. Even the rule prevailing in Georgia cannot be followed; for as we have seen this federal statute is not complicated with

<sup>97\*</sup> *Zeratsky v. Chicago, M. & St. P. Ry. Co.* 141 Wis. 423; 123 N. W. 904.

Under this statute the jury is required to specifically find "whether the negligence of the party so injured was slighter or greater than that of the company." It was held not error to submit a question to

the jury to find whether the plaintiff's negligence was "less or greater" instead of "slighter or greater." "The word 'less' as here used conveyed the same idea to the jury as the word 'slighter' as used in the statute." *Boucher v. Wisconsin Central Ry. Co.* 141 Wis. 160; 123 N. W. 913.

what are in a measure antagonistic clauses in different sections. It does not require of the plaintiff the exercise of due care; and if he did not use due care, that fault of his only goes to the reduction of his damages. There are many instances in which courts have laid down rules applicable to them in which it has been held that the plaintiff had been guilty of contributory negligence and so could not recover. In such cases verdicts have been directed. But the sole question there before the court was, "Had the plaintiff been guilty of contributory negligence?" within the rules adopted by the courts in the specific instance; and if his case fell within one of those rules, he must suffer a defeat, and the court could either enter a non-suit or direct a verdict. But these instances are no longer applicable; for the court cannot weigh the respective negligence of the parties. That is a question for the jury, and it is the jury's sole province to determine. If, however, the evidence clearly shows that the defendant was not guilty of negligence, then, of course, the court may direct the verdict for him, in which event there would be no damages to assess.<sup>98a</sup>

<sup>98a</sup>The Wisconsin statute requires the court to submit to the jury the questions whether any negligence attributable to the railroad defendant "directly contributed to the injury," and, if such negligence is found, "whether the person injured was guilty of any negligence which directly contributed to the injury," and if the jury then find the injured person guilty of contributory negligence, the court shall then submit to them the inquiry "whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company." It is further provided that "in all cases where the jury shall find that the negligence of the company \* \* \* was greater than the negligence of

the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover." In construing this statute the Supreme Court of the state said: "In administering the statute in court as they actually arise, it devolves on the court to determine whether there is any evidence tending to show negligence attributable to the [railroad] company, and contributory negligence of the injured person which proximately contributed to the injury complained of. If the evidence produced tends to show that the negligence of both parties to the action concurred to produce the injury, unless the evidence is so clear and undisputed as to permit of only one inference on the question, it then becomes a



§ 91. **Court telling jury particular acts constitute contributory negligence.**—But because the court cannot direct the verdict, it does not follow that the court cannot inform the jury that the facts proven show the plaintiff had been guilty of contributory negligence, where the facts and inferences to be drawn from them are not conflicting as to the fact that contributory negligence existed, or where courts, by reason of a long line of like repeated facts coming before them have adopted rules that as to the conduct of the plaintiff in such instances the courts will say, as a matter of law, that the plaintiff, in law, had contributed to his own injuries and could not recover. Where the court, how-

question for the jury to determine whether the negligence of the injured party was slighter or greater as a contributing cause to the injury than attributable to the company. In case the evidence permits of only one inference it devolves on the court to decide the issue as a matter of law. Whether a case is one for a court or jury to determine cannot be settled by any general rule or classification of cases, but must be determined in the light of the facts and circumstances of each particular case. The question is not ascertainable by any rule of absolute measurement, and it therefore must be submitted to human judgment. *Zeratsky v. Chicago, M. & St. P. Ry. Co.* 141 Wis. 423; 123 N. W. 904; *Boucher v. Wisconsin Cent. Ry. Co.* 141 Wis. 160; 123 N. W. 913; *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 215; 119 N. W. 309; 120 N. W. 756.

"The Act of Congress of 1908 clearly forbids a nonsuit to be entered in any case where there is evidence of negligence on the part of the defendant. As under this statute the plaintiff can elect to

sue in the state courts, he has naturally chosen to bring his action under the provision of the Federal statute. . . . All that is necessary for us to say in this case is that the plaintiff was engaged in interstate commerce at the time of his injury; that there was evidence of negligence on the part of the defendant; that the plaintiff could elect to sue in the state court, specifying in his complaint, as he does, that he invokes the protection of the Federal statute; and that under its terms the court is forbidden to direct a nonsuit upon the ground that there is evidence of contributory negligence shown by the plaintiff's testimony, because the statute provides that, though the plaintiff may have been guilty of contributory negligence, it shall not bar a recovery. In directing a nonsuit, therefore the judge was guilty of error." *Horton v. Seaboard Air Line Ry. Co.* (N. C.) 72 S. E. 958. It would be otherwise if the facts did not bring the plaintiff within the terms of the statute. *Zachary v. North Carolina R. Co.* (N. C.) 72 S. E. 853.



ever, has said this to the jury—not that the plaintiff could not recover, but that he had been guilty of contributory negligence—it can go no further; for then it becomes the duty of the jury to weigh and determine the relative faults of the party and award or withhold damages accordingly.

**§ 92. Rules of contributory negligence must be considered.**—The well known rule concerning what is and what is not contributory negligence must be considered, and the law applicable thereto constantly be borne in mind. They cannot be ignored. The statute in no way modifies them, except in the proviso when the defendant has violated a statute “enacted for the safety of employe.” If the injury was inflicted by the failure of the defendant to comply with such a statute, then he cannot be held to have been guilty of contributory negligence.

**§ 93. Injury occasioned by defendant having violated a safety device statute.**—The section quoted at the beginning of this chapter expressly provides, “That no employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.” A subsequent section of this statute provides that the employe cannot be held to have assumed the risk where he is injured or killed by the violation by the defendant of any statute enacted for the safety of employes contributive to such injury or death.

**§ 94. Presenting the defense of contributory negligence—Burden.**—This Federal statute has not changed the rule with reference to the presentation of contributory negligence as a defense, except it is now only a partial defense. In the federal courts the burden of presenting contributory negligence of the plaintiff as a defense has always been upon

the defendant,<sup>98</sup> and this burden still continues in a suit brought under this statute. But where the action is brought in the state court then the practice peculiar to that state need not necessarily prevail, unless the burden to show contributory negligence, before the enactment of this statute, has prevailed; for, while the plaintiff must prove the extent of his injuries and practically the amount of his damages, or furnish a basis from which the jury (or court if trying the case without a jury) can estimate or compute such amount, it does not follow that he must first prove that amount and then show to what extent they have been lessened by his own contributory negligence. Therefore, when he has proven his injury and its extent and other attendant facts, thus showing a basis from which the jury can estimate his damages, if the defendant desires to reduce them by showing plaintiff's contributory negligence he has the burden to do so. It necessarily results that if the action is brought in a state court, the burden is upon the defendant to show plaintiff's contributory negligence, if he desires to reduce what the amount of the damages would otherwise be; and that the rule of a state practice casting a burden upon the plaintiff to show his freedom from fault before he can recover, has

<sup>98</sup> *Railroad Co. v. Gladmon*, 15 Wall. 401; 21 L. Ed. 114; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291; 23 L. Ed. 898; *Hough v. Railway Co.* 100 U. S. 213; 25 L. Ed. 612, reversing Fed. Cas. No. 6,221; *Crew v. St. Louis, etc., R. Co.* 20 Fed. Rep. 87; *Hull v. Richmond*, 2 Woodb. & M. 337; *Dunmead v. American, etc., Co.* 4 McCrary, 244; *Dillon v. Union Pacific R. Co.* 3 Dill. 325; *Morgan v. Bridge Co.* 5 Dill. 96; *Secord v. St. Paul, etc., R. Co.* 5 McCrary, 515; *Wabash, etc., R. Co. v. Century Trust Co.* 32 Alb. L. Jr. 96.

Suppose the contributory act of the employee caused the employer

damages, for instance, injured several other persons who recover damages from the employer. Can the latter, when sued by his employee, by counter claim (in those states allowing a counter claim in actions to recover damages occasioned by negligence) reduce the damages or defeat his action by setting up the damages his contributory negligence has occasioned? It is thought not; because the statute does not give the employer a cause of action where his act contributed to the injury, which would be the case if the counter claim be sustained.

necessarily been changed and does not apply when the action is based upon the Federal Employers' Liability Act.<sup>99</sup>

§ 95. **When contributory negligence does not diminish damages.** The proviso to section three provides that if the injury or death of the employe was occasioned by the violation by the common carrier of any statute enacted for the safety of employes, or rather if the violation contributed to it, the employe shall not "be held to have been guilty of contributory negligence" in such case. When such a case is presented the factor of the employer's contributory negligence is not to be considered in order to reduce his damages. The statute absolutely prohibits it. But, of course, the violation of the statute must have been the proximate cause of the injury, else the employee would not be guilty of negligence at all; and if the employee's act was the proximate cause of the injury, irrespective of the violation of the statute, then he cannot recover; because the employer has been guilty of no actionable negligence. So, in instances of a violation of a (Federal) statute, resulting in an injury to the employe, where section four provides it shall not be considered that the employe assumed the risk, the damages cannot be diminished by reason of his negligence contributing to the result. But in all such instances the violation of the statute must have caused or produced the injury—must have been the proximate cause of it.

§ 96. **Examples under Wisconsin statute.**—Under the Wisconsin statute if the negligence of the plaintiff is "slighter" than that of the defendant railroad company he may recover; if their joint negligence be even he may not.

<sup>99</sup>In Wisconsin the rule was that the defendant had the burden to show that the plaintiff had been guilty of contributory negligence, in order to defeat the action; and it was held that the statute of 1907, allowing a recovery where the plaintiff's negligence was

slighter than that of the defendant, did not change the rule concerning kind of contributory negligence that had theretofore existed. *Zeratsky v. Chicago, M. & St. P. Ry. Co.* 141 Wis. 423; 123 N. W. 904.

In a case arising under this statute the facts were substantially as follows: The plaintiff was the rear brakeman on the defendant's extra freight train, consisting of fifty-four cars, caboose and an engine, which left Green Bay of that state at 10:10 p. m. bound for Milwaukee. It had a full crew of trainmen, consisting of the engineer, fireman, conductor and two brakemen. The train proceeded south through De Pere at 11:05 p. m., and through Ackerton, and, when about one and one-fourth miles from Hilbert Junction, the engine ran out of water, and was unable to pull the train to Hilbert Junction. "The plaintiff was in the caboose when the train stopped. The engineer, fireman, conductor, and the other brakeman, without informing plaintiff of their intention, cut the engine from the train, and proceeded with it to Hilbert Junction to get a supply of water without giving a signal to the plaintiff, as required by the following rule of the company: 'Rule 26. The one long, two short, and one long blast of the whistle thus, ———, —, —, ———, will be given by engineers when they find it necessary to stop between stations and to notify conductor, thus enabling him to drop off and send back a flagman.' As soon as plaintiff observed that the train had stopped, he left the caboose, and went forward to about the middle of the train to ascertain the cause of the stopping. He there observed that the engine had been cut off, and had left with the rest of the crew, and he then started back. The plaintiff stated that, while going forward and coming back, he observed the odor of a hot box, and he tapped the boxes to find the one, and immediately upon his return he went into the caboose to get his dope bucket to fix it. He testified that he took no more time than was necessary to make this trip. 'Special rules for train and engine men' of the defendant contains the following: 'Rule B4. Conductors and brakeman must examine their trains, whenever there is an opportunity to do so, looking particularly for hot boxes and defective draft and brake rigging.' Meanwhile the defendant's regular passenger train bound



for Milwaukee on the same line as that on which the freight was proceeding had arrived at Green Bay at about 12:30 a. m., and had left a few minutes later. At De Pere it was permitted to enter the block which was occupied by the freight train. One of the rules of the defendant was as follows: 'Rule 3. Trains must not pass a block signal at danger except under authority of a clearance card form 168.' The conductor and engineer were given permissive and clearance cards under the following rules, which trainmen are supposed to know and obey:

'Rule 4. When the block signal stands at danger, the operator issues a clearance card which states that he has no orders or no further orders for the train named. The train receiving clearance card may proceed if its time table rates or special orders permit it to do so.'

'Rule 5. The permissive card is used when trains are permitted to pass a block signal at danger and enter the section under notice that the preceding train has cleared the same section. This is to be used only by direction of the train dispatcher.'

'Rule 6. When a train is to proceed under a permissive card, the conductor and engineer must each have a card of the following form properly filled out and signed by the train dispatcher.'

'Rule 10. Trains running under the authority of a permissive card or caution signal must run with great care and at reduced speed to ensure against collisions with trains ahead.'

A special caution order was issued to the conductor and engineer in these words: 'Extra east, Dietzler conductor, left De Pere at 11:42 p. m. and has not yet arrived at Hilbert Junction. Proceed cautiously, expecting to find them on main line at any point without flag protection.' The passenger proceeded south—or east as it is called in railroad parlance—and, when running at a speed of about thirty miles per hour, collided with the rear end of the freight train which had stopped on the main track a mile and one-



quarter from Hilbert Junction. The freight train crew had not been specifically informed that the passenger train had been permitted to enter the same block or section of track as was occupied by the freight train. The plaintiff, who was in the caboose of the freight train, was seriously injured by the collision. The fireman of the passenger train was killed, and the engineer was injured. There was a straight and unobstructed stretch of track back of the caboose of three thousand feet. Whether or not the red lights were burning on the caboose was a disputed question on the trial.

The following rules of the defendant regarding the operation of trains were in force at the time of the collision:

'Rule 62. When a train stops between stations, a flagman must immediately go back with proper signals to stop any trains that may be following. Not a moment must be lost in inquiry as to the cause of stoppage or its probable duration. The flagman must go back instantly and shall take not less than three torpedoes, also a red flag by day and a red and white light by night, and shall place one torpedo on the rail on the engineer's side when three-fourths of a mile (23 telegraph poles) distant from the rear of train, and at a further distance of one-fourth mile (eight telegraph poles), he shall place two torpedoes on the rail on the engineer's side. He will then, selecting a place where the view is long and clear, remain until the train is stopped or he is recalled. Returning he will leave two torpedoes at the most distant point from his train and take up the rest. Whenever it becomes necessary, the forward end of the train shall be protected in the same manner.'

'Rule 50. Train and engine men will be held equally responsible for violation of any of the rules governing the safety of trains, and they must take every precaution for the protection of trains, even if not provided for by the rule.'

'Rule 26. Conductors will be held responsible for the faithful performance of the duty required on the part of their brakemen.'

'Rule A58. Trains moving under permissive card will be held responsible for an accident in the nature of colliding with the train occupying the section which required movement under the permissive card. Engineers will not be censured for moving at a speed to insure against accident.'

The defendant alleges that the collision was caused by the failure of the passenger engineer to observe its train orders and the rules and regulations known to him, together with the contributory negligence of the plaintiff and his violation of the defendant's rules and regulations."

At the close of the testimony, the court, on defendant's motion, directed a verdict for the defendant, and judgment was rendered upon the verdict so rendered. This was held error, on the ground that the facts presented a case for the jury to determine whether the negligence of the plaintiff was not "slighter" than that of the defendant. The statute required the jury to find if the negligence of the defendant "directly contributed to the injury;" and the court construed this to merely mean negligence proximately contributing to the injury, and that the use of the word "directly" did not operate to modify the law of proximate cause in the law of negligence. "It is alleged," said the court in passing on the evidence, "that the plaintiff was guilty of negligence in omitting to perform his duty as brakeman on the occasion in question, in that he failed to protect the rear of the freight train from the passenger train, and that this failure of duty by him was a proximate cause of the collision and his injuries. The contention is that, but for plaintiff's contributory negligence, the injury would not have been received; and hence that the negligence of the plaintiff in its most favorable aspect under the law is equal to the negligence attributable to the defendant as a contributing cause to the injury. In the solution of this question all of the inferences from the evidential facts most favorable in support of the plaintiff's alleged cause of action must be assumed to be the view of the case which may be taken by the jury. The contention that plaintiff's

duty did not require him to flag the train under rule 62, unless directed so to do by the train conductor or by a signal from the engineer by a blast from the whistle, cannot be sustained. The rule is clear in its provision that, when a train stops between stations, a flagman must go back to stop any train that may be following, give the prescribed signals to it, and remain at the place to which he has gone until the train stops or he is recalled. This duty is further enjoined by rule 50, which informs persons engaged in the train service that: 'Train and engine men will be held equally responsible for a violation of any of the rules governing the safety of trains, and they must take every precaution for the protection of trains even if not provided for by the rules.' We find no support for plaintiff's claim that the duty imposed by these regulations was disregarded in practice to such an extent as to abrogate them. Nor is it shown that the plaintiff was informed while in defendant's service that these rules and the duties imposed thereby were not obligatory on him. We think that the plaintiff as rear brakeman of this train was required to perform whatever duty these rules imposed on him.

"The evidence tends to show that the plaintiff was the rear brakeman on a freight train which came to a stop on the main track between stations. He had not been informed by the engineer's signal that the train was to make a stop. So far as he then knew, the train might be stopped only momentarily. In the operation of trains, stops of a momentary character must inevitably occur, and on such occasions it would be both unnecessary and impracticable for the rear brakeman to leave the train at once to signal a train that might be following. It is obvious that, if the brakeman should immediately so leave his train on all such occasions, he would on many occasions be wholly separated from his train. He testifies that he went forward to a point where he observed that the engine had been detached from the train and had departed for Hilbert Junction; that then he crossed over to the other side of the train; that he

observed the odor of a hot box, and that he attempted to locate it while he was returning to the caboose; that he took no more time than it naturally takes to make such a trip; that he returned to the caboose without intending to go and signal the coming passenger train; that he at once looked for the dope bucket in the caboose to fix the hot box; and that the collision occurred immediately. It is argued that this amounts to a violation of his duty under the rules and establishes his contributory negligence. Upon learning that the engine had departed for Hilbert Junction, it became the duty of the plaintiff to procure the means and to go back to signal a coming train, and in omitting so to do he was guilty of not exercising that care which the situation and the exigencies of the case demanded, but it is not so clear that it can be held as matter of law in what degree it contributed to produce the injury. The contention that it amounted to the very highest degree of negligence because the accident would not have happened but for the violation of defendant's rules seems necessarily to assume that the plaintiff in making this trip to ascertain whether the train was to stop more than momentarily, and in not instantly, upon the stopping of the freight train, taking steps to signal the coming passenger train, was guilty of such a high degree of negligence as to preclude his recovery. He testifies that he consumed from fifteen to twenty-five minutes on his trip; that he relied on the red light signals displayed on the rear of the caboose to signal the coming passenger train; that he went to the caboose for the dope bucket to fix the hot box, and while in this act the collision occurred. It is not clear from the record that, if on his return to the caboose he had immediately proceeded to procure his lantern and torpedoes to signal the coming train, he would have prevented the collision. The degree of negligence involved in these acts is not so clear that it can be determined as a matter of law. Under the circumstances, it is a mixed question of law and fact which must be resolved by the jury.



“The case also demands of the jury that they determine in what degree the negligence attributable to the company contributed to produce the injury. Among the matters bearing on this question it is alleged that the train dispatcher was derelict in his duty in permitting the passenger train to enter the block as he did; that the engineer of the passenger train omitted to obey special and express orders in running his train on the block; and that the conductor and the engineer of the freight train were negligent in not signaling or warning this brakeman of the stop, and in failing to ascertain before stopping that the plaintiff as rear brakeman was on duty or capable of protecting the rear of the train. In passing on the question of whether or not the company’s negligence caused plaintiff’s injuries in greater degree than that of the plaintiff, all of these facts relating to the omission of duty on the part of these servants who occupied positions of great responsibility in the conduct of the defendant’s business must be viewed in comparison with the acts of the plaintiff in the light of their respective duties and their responsibility to exercise a degree of care commensurate to the exigencies of the situation. The case is not so plain and clear that but one inference can reasonably be drawn from the evidence as to the questions, and they therefore should have been submitted to the jury for determination.”<sup>100</sup> Another case may be taken from the Wisconsin Supreme Court decision that will serve to illustrate the application of the statute of that state and incidentally throw light upon the construction of the Federal statute. The following is the statement of the case as made by the court with so much of the opinion of the court as passes upon the question of the contributory negligence of the plaintiff:

“At North Fond du Lac the defendant had an arrangement for handling cinders. The arrangement is the only one

<sup>100</sup> *Zeratsky v. Chicago, M. & St. P. Ry. Co.* 141 Wis. 423; 123 N. W. 904.



of its kind operated by the defendant. Under one of the defendant's tracks is what is known as the 'cinder pit.' On the bottom of the cinder pit, which lies nine or ten feet below the track, are two sets of parallel tracks running east and west. At the north and south of the tracks in the pit are abutments. The east end of the pit is closed. The pit is reached by a curved inclined track about 300 feet long. There is room in the cinder pit for two gondola cars. When the two cars are in the pit, they came very close together, and are very close to the abutments. In using the pit the cars are at first run partly in, being blocked so that the half farthest in is under the track above. Locomotives on the track above are stopped over the cars in the pit, and the ashes and cinders which are dumped therefrom fall between the rails into the cars below. When the cars are half filled, the block is removed from the wheels, and the cars are allowed to slide down the incline so as to permit the filling of the other half. Owing to the curve and the incline of the track leading into the pit, a chain coupling is used between the cars and the engine when cars are placed in the pit.

"The plaintiff's intestate had been employed by the defendant for about nine months as a brakeman. On August 4, 1908, the deceased was assigned to assist, under the switch foreman, at the task of removing the filled cars and of placing empty ones therein. The two loaded cars were removed by the foreman of the regular switch crew with the aid of an engine crew, who had not performed this work before, and an empty car had been placed on the north track. The deceased had meanwhile tended a switch. When the second car was being placed, the deceased assisted and did the uncoupling of the engine from the car. The engine had run the empty car too far into the pit, and it was necessary to back out. When the car was in proper position, it was blocked there by Loucks, the foreman of the regular switch crew, who then stepped back to the north of the car, so that he was about 10 feet from the deceased.

The engine was still attached to the empty car by the chain coupling, and it was necessary for the engine to move a little toward the car, so that the pin holding the chain could be pulled out and the engine uncoupled from the car. The space between the drawbars of the car and the engine was about two feet. The deceased stepped from the north between the engine and the car to draw the pin, and was then on that side of the drawbars. He gave by word and sign the signal for 'slack the pin.' The foreman communicated the signal to the fireman, by whom it was, in turn, communicated to the engineer. Thereupon the engineer released the brake on the engine and it slowly started toward the car. Loucks, the foreman of the switch crew, was the only person who was observing the deceased. He testified that the deceased, whose back was toward him, pulled the pin; that the chain dropped from the car; that just after the deceased pulled the pin he moved forward between the drawbars of the car and the engine; and that, as he stepped forward, he turned his face toward the engine, and was immediately caught between the drawbars. The engine moved forward, and the deceased was caught and injured and crushed between the drawbars of the car and of the engine. He died almost instantly. Besides the injury to the part of the body caught between the drawbars, the thumb of the right hand of the deceased was injured. The jury found that the negligence of the engineer in slacking the pin was the proximate cause of the death of the deceased, and that it was greater as a contributing cause to his death than the negligence of Boucher himself. They also assessed the damages."

"The appellant," said the court, "assails the court's decision holding that the evidence in the case required submission of the issues whether the engineer was negligent in conducting the defendant's business at the time Boucher was injured; if so negligent, whether it was the proximate cause of the injury, and whether such negligence was a greater or less contributing cause in producing Boucher's

death than his contributory negligence. The facts of the case controlling these questions are within a narrow compass, and are so interrelated that a reference to them will suffice for the consideration of all the questions presented by these contentions. The foregoing statement of them makes clear what were the duties assigned Boucher and the engineer in conducting the defendant's business at the time of the accident. It is argued that the facts wholly fail to show that the engineer was negligent in managing the engine for the purpose of slacking the coupling chain when signaled so to do by Boucher, and that the accident was wholly due to the fact that the decedent deliberately and negligently stepped into a place of obvious and imminent danger. It is undisputed that the car had been shoved into the cinder pit; that it had been blocked; that the engine had come to a stop; that the chain forming the coupling between the car and the engine was taut so that the coupling pin could not be released without slacking; that the decedent was required in the performance of his duty to step between the car and the engine to do the uncoupling; that it devolved on him to give the signal for slacking the coupling chain to enable him to pull the coupling pin; and that it was the duty of the engineer to move the engine for this purpose when the signal therefor was communicated to him. There is no dispute but that the signal to this effect was communicated to the engineer for this purpose. The switch foreman testifies that the decedent gave the signal for the 'slack of the pin,' and that he communicated it to the fireman. The fireman testifies that he communicated it to the engineer, and that he thereupon moved the engine forward. The engineer testifies that he received the signal 'to slack ahead,' which implied that he was to proceed until signaled to stop. He states that his recollection of the signal is uncertain. He also testifies that he was fully informed that the car had been blocked, that the engine was required to move forward only a few inches to slack the chain in order to loosen the coupling

pin; that a movement of a few inches would suffice and was the only movement toward the car required of the engine; that the last act before moving the engine away from the car was the uncoupling; and that he fully understood all the facts and conditions of the service in which they were then engaged. The court submitted to the jury the question of whether the engineer under the circumstances was negligence in the management of the engine which resulted in a forward movement of several feet and in contact with the car.

“The point is made that the engineer had a right to move the engine as he did in response to the signal given him. There is dispute, however, as to what signal he received. The jury evidently found that he received the signal to slack the pin, and that this called on him to move the engine only a few inches. There is evidence of other employees of the defendant in support of this view. Furthermore, the engineer was fully informed of the whole situation and the conditions under which he was acting and knew that he was required to move the engine no more than was necessary to slack the pin. In fact, he moved the engine several feet, and thereby brought about the contact between the engine and the car whereby Boucher was injured. It is evident that the movement of three or four inches of the engine could have been made readily.

“However, it is claimed that the engineer had no reason to anticipate that an injury would result from the movement made by the engine. The situation apprised him that Boucher was then between the car and the engine for the purpose of pulling the coupling pin, and that such a movement as was made must result in a collision with the blocked car in the cinder pit. Surely such a movement of the engine was fraught with danger to the decedent, who was in a proper position to perform his service, and the engineer had a reasonable basis for anticipating that an injury might result from such management of the engine. We are led to the conclusion that the facts and circumstances of the



case required that the question of the engineer's negligence in the management of the engine should be submitted to the jury as was done in the first question of the special verdict. The court informed the jury that this question included the inquiry as to whether the engineer was negligent in moving the engine forward to remove the strain from the coupling chain, and thus to free the coupling pin so that it could be pulled. The instructions in this respect fully informed the jury of the scope of this issue, and of what it embraced. The court in calling the jurors' attention to the evidence on this subject did not restrict the jury to the portion he alluded to, but instructed them to take into consideration all the evidence bearing on the inquiry so submitted to them. The instructions so given were free from undue restrictions on the jury in their deliberations, and in no way misled them.

"It is contended that the court erred in refusing to instruct the jury to the effect that, if the engineer was found guilty of negligence, it was not the proximate cause of Boucher's death, and that his death was proximately caused by his contributory negligence. The court found as matter of law that the decedent was guilty of contributory negligence. The argument is made that the engineer had a right to rely on the fact that Boucher under no circumstances would occupy a place wherein he might be caught between the drawbars of the car and the moving engine and thus meet certain death, unless he deliberately placed himself in this obviously and imminently dangerous position. Is this a legitimate deduction from the facts and circumstances of the case? We do not so regard it. Boucher's conduct must be considered in the light of the situation as disclosed by the facts and circumstances under which he performed his duties. It is clear that he took a position between the car and the engine where he could readily grasp and pull the coupling pin from the coupling device of the car, and that he pulled the pin and thereby caused the chain to drop. The jury from the evidence must have



found that in giving the signal to 'slack the pin' he called for a forward movement of the engine of but a few inches. In his position between the car and the engine his back was turned toward the engine, and there was sufficient space for him to pass between the drawbars of the car and the engine. Having given the signal to the engineer to come forward with the engine sufficiently to slack the pin, he, in the exercise of reasonable care, might well anticipate that the engine would move no farther than required for this purpose. While he cannot be deemed free from blame in not looking to see if the engine was approaching, it does not appear but that he may have taken the step to complete his duties, and that in the ordinary course of discharging his duties he got into this space through very slight inadvertence, or that the physical condition of the track may have caused him to take this step. All this refutes the assumption that he deliberately placed himself in a place imminently dangerous to his life. From the situation thus presented, it cannot be said that the duty to protect himself against the hazards incident to the engineer's conduct rested solely on Boucher, and that the engineer was free from legal responsibility as to the result. From the very nature of the situation and corresponding duties of the two men to guard Boucher against injury it may be said that the negligence of the engineer was of a graver and weightier character as a contributing cause to Boucher's death than that of the decedent. After careful examination of the evidence and much reflection, we have become persuaded that the facts of the case are not so clear upon the issue of the engineer's negligence and its proximate contribution toward causing Boucher's death and upon the question of whether the decedent's contributory negligence was slighter or greater than that attributable to the defendant as to require determination of them by the court as matter of law. The court properly submitted them to the jury.

"It is strenuously argued that the jury cannot determine from the evidence whether Boucher's death was caused

in greater part by the negligence of the defendant as compared with his contributory negligence, and hence that the plaintiff has failed to establish her cause of action. In support of this claim, the contention is made that the burden is on the plaintiff to establish a cause of action, and that the evidence fails to show any grounds justifying Boucher's stepping between the drawbars, and he must therefore be held to have taken this step knowing it meant certain death. The facts and circumstances of this situation already adverted to we think negative this claim, and show that the jury could have found that he entered this space through slight inadvertence, and that the conduct of the engineer in comparison therewith may be considered a weightier and graver default."<sup>101</sup>

In another case it appeared that the deceased was a section foreman. At seven o'clock in the morning he started out on a handcar. It was a very dark and foggy morning. When the car had run about four thousand feet, it was run into and he was killed by a locomotive and caboose. The locomotive and caboose was running as an irregular train, ahead of a passenger train; and the deceased had notice of it before he started. This train was running at the usual speed without the headlight being lighted, it having been extinguished, but the engineer was not aware of that fact and it was not possible to tell from his position on the locomotive at the time whether it was burning or not. The engineer failed to sound his whistle at the first crossing west of the station or at the mile post. It was held that the engineer's negligence was not gross, as compared to that of the decedent, so as to entitle the plaintiff to recover, notwithstanding the decedent's contributory negligence, under the provisions of the statute. It was held that there was no evidence from which a court or jury could say that the negligence of the decedent was slighter than that of the engineer.<sup>102</sup>

<sup>101</sup> Boucher v. Wisconsin Central Ry. Co. 141 Wis. 160; 123 N. W. 913.

<sup>102</sup> Dohr v. Wisconsin Central Ry. Co. 144 Wis. 545; 129 N. W. 252. A different result was

§ 97. **Practice under Wisconsin statute.**—Under the Wisconsin statute it is proper to cover the question of the negligence of the defendant and the contributory negligence of the plaintiff by one or more appropriate questions submitted to the jury, each involving a singular issuable idea according to the circumstances, in accordance with the practice under the special verdict law, for the reason that the answer of “Yes” or “No” would often not inform the court with reasonable certainty of a unanimous agreement upon either of the several ideas distinctively joined by the statute. The better practice is to use the words “want of ordinary care” rather than the word “negligence” in submitting the questions to the jury; and the words “proximately contributing” should be used instead of the words “directly contributing,” since that is the construction given by the Supreme Court to the last two words. The submission of the questions to the jury whether the company or any officer other than the person injured was guilty of a want of ordinary care, and if that be true, whether the person injured was guilty of ordinary care, should only be made in so far as they are warranted by the evidence. The set phrase whether the fault of the injured party “was greater or slighter as a contributing cause” should not be used, but only whether the fault of the defendant was the greater, in order to administer the statute in its spirit.<sup>103</sup>

reached on the facts in *Clary v. Chicago, M. & St. P. Ry. Co.* 141 Wis. 411; 123 N. W. 649.

<sup>103</sup> *Jensen v. Wisconsin Central Ry. Co.* 145 Wis. 326; 128 N. W. 982.

## CHAPTER VI.

### DEATH BY WRONGFUL ACT.

SECTION	SECTION
98. Statute.	113. Beneficiary must survive deceased—Complaint.
99. No action at common law.	114. Statute of limitations.
100. Constitutionality of statute allowing recovery for beneficiaries.	115. Who brings the action in case of death.
101. Deceased without right of recovery.	116. Complaint.
102. Failure of deceased to bring action.	117. Damages by way of solatium.
103. Instantaneous death.	118. Damages for suffering of deceased—Medical and funeral expenses.
104. Survival of injured employee's cause of action.	119. Measure of damages.
105. Beneficiaries on death of injured employee.	120. Use of annuity tables.
106. No husband or widow surviving.	121. Interest.
107. Next of kin dependent upon employee.	122. Damages not part of estate.
108. Who are dependent on deceased.	123. Judgment recovered by deceased.
109. Bastard.	124. Costs.
110. Emancipated child.	125. Suit by poor person.
111. Adopted child.	126. Distribution of amount recovered.
112. Posthumous child.	127. Death of beneficiary.
	128. Distribution of amount recovered.
	129. Right of widow to sue under state statute.

§ 98. **Statute.**—The statute provides that a common carrier by railroad while engaging in certain commerce, “shall be liable in damages to any person suffering injury while he is employed in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe’s parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carriers,” etc. Under the statute only the

administrator (and perhaps the executor) can bring the suit.<sup>1</sup> The general administrator may bring the action, a special one is not necessary.<sup>2</sup>

§ 99. **No action at common law.**—The maxim *actio personalis moritur cum persona* applied to actions at common law for the death of a person; and this is true whether the death was instantaneous or not as a result of the injury.<sup>3</sup> Therefore, if a right to recover exists, it must be given by a statute.<sup>4</sup> A statute giving a right of action in force at the place of the injury applies to a suit in admiralty.<sup>5</sup>

§ 100. **Constitutionality of statute allowing recovery for beneficiaries.**—It is no longer an open question that a stat-

<sup>1</sup> Cleveland, etc., R. Co. v. Osborn, 36 Ind. App. 34; 73 N. E. Rep. 285; Dillier v. Cleveland, etc., R. Co. 34 Ind. App. 52; 72 N. E. Rep. 271; Lake Erie, etc., R. Co. v. Charmer, 161 Ind. 95; 67 N. E. Rep. 623; Cleveland, etc., R. Co. v. Osgood, 36 Ind. App. 34; 73 N. E. Rep. 285.

<sup>2</sup> Lake Erie, etc., R. Co. v. Charmer, *supra*; Cleveland, etc., R. Co. v. Osgood, *supra*.

<sup>3</sup> Higgins v. Yelverton, Yelv. 89; Baker v. Bolton, 1 Campb. 493; Osborn v. Gillett, L. R. 8 Exch. 88; 42 L. J. Exch. 53; 28 L. T. (N. S.) 197; 21 W. R. 409; Carey v. Berkshire R. Co. 1 Cush. 475; adjudged cases forbids that nonresidents v. Lexington, etc., R. Co. 14 B. Mon. 165; Hyatt v. Adams, 16 Mich. 180; Grosso v. Delaware, etc., R. Co. 50 N. J. L. 317; 13 Atl. Rep. 233; Lyons v. Woodward, 49 Me. 29; Wyatt v. Williams, 43 N. H. 102; Kramer v. Market St. Ry. Co. 25 Cal. 434; Little Rock, etc., Ry. Co. v. Barker, 33 Ark. 350; Edgar v. Costello, 14 S. C. 20; Natchez etc., R. Co. v. Cook, 63 Miss. 38; Scheffler v. Minneap-

olis, etc., R. Co. 32 Minn. 125; 19 N. W. Rep. 656; Sherman v. Johnson, 58 Vt. 40; 2 Atl. Rep. 707; Thomas v. Union Pac. Ry. Co. 1 Utah, 132; Sullivan v. Union Pac. Ry. Co. 2 Fed. Rep. 447; 1 McCrary, 301; Whitford v. Panama R. Co. 23 N. Y. 465; Hubgh v. New Orleans, etc., R. Co. 6 La. Ann. 495; Herman v. New Orleans, etc., R. Co. 11 La. Ann. 5; Connecticut, etc., Co. v. New York, etc., R. Co. 25 Conn. 265; Insurance Co. v. Brame, 95 U. S. 754; 24 L. Ed. 580; The Harrisburg, 119 U. S. 199; 7 Sup. Ct. Rep. 140; 30 L. Ed. 358; reversing 15 Fed. Rep. 610; *In re La Burgogne*, 117 Fed. Rep. 261.

<sup>4</sup> Louisville, etc., R. Co. v. Jones, 45 Fla. 407; 34 So. Rep. 246; Peers v. Nevada, etc., Co. 119 Fed. Rep. 400; Fithian v. St. Louis & S. F. Ry. Co. 188 Fed. 342; Duke v. St. Louis & S. F. Ry. Co. 172 Fed. 684; Dillon v. Great Northern Ry. Co. 38 Mont. 485; 100 Pac. 960.

<sup>5</sup> Lindstron v. International, etc., Co. 117 Fed. Rep. 170; The Northern Queen, 117 Fed. Rep. 906.



ute allowing a recovery for the benefit of those dependent upon the deceased is constitutional. The validity of such a statute has been firmly established.<sup>6</sup> This is true although the statute only applies to railroad companies.<sup>7</sup> Once the cause of action has accrued in favor of a beneficiary, a subsequent statute cannot change the beneficiary,<sup>8</sup> or repeal the right to the action.<sup>9</sup>

§ 101. **Deceased without right to recover.**—The beneficiaries only receive their right to recover damages through the right of the deceased to recover damages if he had brought the suit. If he could not successfully maintain an action for his injuries, his administrator cannot maintain one successfully for their benefit.<sup>10</sup>

§ 102. **Failure of deceased to bring action.**—The failure of the deceased to bring suit for his injuries, though he had ample time to do so, is no defense.<sup>11</sup>

§ 103. **Instantaneous death.**—The statute expressly provides for an action in favor of the beneficiaries in case of

<sup>6</sup> Boston, etc., R. Co. v. State, 32 N. H. 215; Louisville, etc., R. Co. v. Louisville, etc., Co. (Ky.) 17 S. W. Rep. 567; Carroll v. Missouri Pac. Ry. Co. 88 Mo. 239; Sherlock v. Alling, 93 U. S. 99; 23 L. Ed. 819; affirming 44 Ind. 184; Southwestern, etc. R. Co. v. Paulk, 24 Ga. 536; Bond v. Seerace, 2 Duv. 576. So the Federal statute is valid. Zikos v. Oregon R. & N. Co. 179 Fed. 893.

<sup>7</sup> Boston, etc., R. Co. v. State, *supra*.

<sup>8</sup> Chicago, etc., R. Co. v. Pounds 11 Lea (Tenn.) 130.

<sup>9</sup> Denver, etc., R. Co. v. Woodward, 4 Colo. 162; Lundin v. Kansas Pac. Ry. Co. 4 Colo. 433.

<sup>10</sup> Evansville, etc., R. Co. v. Lowdermilk, 15 Ind. 120; Ohio, etc.,

R. Co. v. Tindall, 13 Ind. 366; Hecht v. Ohio, etc., R. Co. 132 Ind. 507; 32 N. E. Rep. 302; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442; 8 N. E. Rep. 18; 9 N. E. Rep. 357; Pittsburg, etc., R. Co. v. Hosea, 152 Ind. 412; 53 N. E. Rep. 419; Kaufman v. Cleveland, etc., R. Co. 144 Ind. 456; 43 N. E. Rep. 446; Pennsylvania, etc., R. Co. v. Meyers, 136 Ind. 242; 36 N. E. Rep. 32; Madison, etc., R. Co. v. Bacon, 6 Ind. 205; Neilson v. Brown, 13 R. I. 651; Martin v. Wallace, 40 Ga. 52; Wallace v. Connor, 38 Ga. 199; Pym v. Great, etc., Ry. Co. 2 B. & S. 759.

<sup>11</sup> Malott v. Shimer, 153 Ind. 35; 54 N. E. Rep. 101.

death of the injured persons; and this applies to an instantaneous death.<sup>12</sup>

§ 104. **Survival of injured employee's cause of action.**—Before the amendment of 1910 the cause of action given the injured employee did not survive his death, but died with him.<sup>12a</sup> Consequently if the injured person died after bringing suit to recover damages for his injuries, his personal representative could not be substituted and prosecute the suit for the benefit of the heirs or widow of the deceased; <sup>12b</sup> but he must bring a new action for that purpose. But Congress remedied this defect by amending section nine of the act so as to read as follows: "That any right of action given by this Act to a person suffering injury shall survive to his or her personal representatives, for the benefit of the surviving widow and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." The cause of action mentioned in this section as amended, is the right to maintain a suit to recover damages given by the statute to the injured employee, and is not the cause of action given the widow and children, and the other persons named, to recover damages for their

<sup>12</sup> Brown v. Buffalo, etc., R. Co. 22 N. Y. 191; Reed v. Northeastern R. Co. 37 S. C. 42; 16 E. E. Rep. 289; Roach v. Imperial Mining Co. 7 Fed. Rep. 698; 7. Sawy. 224; International, etc., R. Co. v. Kindred, 57 Tex. 491; Murphy v. New York, etc., R. Co. 30 Conn. 184; Conners v. Burlington, etc., R. Co. 71 Iowa, 490; 32 N. W. Rep. 465; Worden v. Humeston, etc., etc., R. Co. 72 Iowa, 201; 33 N. W. Rep. 629; Nashville, etc., R. Co. v. Prince, 2 Heisk. (Tenn.) 580; Fowleker v. Nash,

5 Baxt. (Tenn.) 663; Haley v. Mobile, etc., R. Co. 7 Baxt. (Tenn.) 239; Kansas City, etc., R. Co. v. Daugherty, 88 Tenn. 721; 13 S. W. Rep. 698; Van Amburg v. Vicksburg, etc., R. Co. 37 La. Ann. 651; Hamilton v. Morgan, etc., R. Co. 42 La. Ann. 824; 8 So. Rep. 586.

<sup>12a</sup> Walsh v. New York, N. H. & H. R. Co. 173 Fed. 494; Fulgham v. Midland Valley R. Co. 167 Fed. 660.

<sup>12b</sup> Walsh v. New York, N. H. & H. R. Co. 173 Fed. 494.

support.<sup>12c</sup> If the death of the employee be instantaneous on receiving his injury, then there is no cause of action to survivor, and the amendment quoted above does not apply.<sup>12d</sup> Under the Federal statute the administrator has his option, when the deceased has brought an action during his lifetime to recover damages, to either prosecute that action or dismiss it and bring his own action; but he cannot wage both causes of action, he must take his choice.

**§ 105. Beneficiaries on death of injured employee.**—In an instance of the death of the injured employe his personal representative brings the action for the benefit of those surviving him and they are entitled to the proceeds of any judgment that may be recovered in the following order, viz:

*First*—The surviving widow or husband and children of such employe.

*Second*—If there be no husband, widow or children, then for the benefit of the employe's parents.

*Third*—If there be no beneficiaries under the first and second class, then for the benefit of the next of kin dependent upon such employe.

If there be persons of the first class, all the persons of the second and third class are excluded; if there be none of the first and be those of the second class, all those of the third class are excluded; and it is only where there are none of the first and second classes that those of the third class can be considered as beneficiaries.<sup>13</sup>

<sup>12c</sup> The case of Fulgham cited above was discussed at length in the Senate when this amendment was before it.

<sup>12d</sup> *Dillon v. Great Northern Ry. Co.* 38 Mont. 485; 100 Pac. 960.

<sup>13</sup> *Dillier v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271.

Suppose the deceased employe left no surviving widow, no chil-

dren, no parent and no next of kin depending upon him; and a state statute gives a cause of action where a person, in such an instance is killed by the negligence of another. Can the administrator of the deceased maintain an action under this state statute? If the act is to be construed as exclusive, then the action cannot be brought; if not

§ 106. **No husband or widow surviving.**—It will be noted that the statute provides in the first class that the suit shall be brought “for the benefit of the surviving widow or husband and children of such employe,” and the question naturally arises, “Suppose, where the deceased employe is a husband and father and no widow survives him, can the suit be maintained for the benefit of his children alone? Must there be a surviving widow in such an instance, in order to authorize the bringing of the suit?” These questions have been answered by some of the state courts in construing similar statutes, and held that though there be no widow surviving the deceased, but children survive, the action can be maintained.<sup>14</sup>

§ 107. **Next of kin dependent upon employe.**—If there be no widow or husband and children or parent of the deceased employe, then “the next of kin dependent upon” him are entitled to the proceeds of the action, these falling in the third group of beneficiaries. But the fact that the next of kin are non-resident aliens does not defeat the action.<sup>15</sup> Partial dependency is sufficient to authorize the maintenance

as exclusive, then it can be. Congress has failed to give a right of action for the benefit of creditors, and if the act is to be construed as exclusive, then none can be maintained by an administrator.

Steps towards a divorce, but not procured, still leaves the wife a beneficiary. *Abel v. Northampton, etc.*, Co. 212 Pa. St. 329; 61 Atl. Rep. 915.

<sup>14</sup>*City of Chicago v. Major*, 18 Ill. 349; *Haggerty v. Central R. Co.* 31 N. J. L. 349; *McMahon v. City of New York*, 33 N. Y. 642; *Quin v. Moore*, 15 N. Y. 432; *Oldfield v. New York, etc., R. Co.* 14 N. Y. 310; *Tilley v. Hudson R. Co.* 24 N. Y. 471.

<sup>15</sup>*Rietveld v. Wabash R. Co.* 129 Ia. 249; 105 N. W. Rep. 515; *Pittsburg, etc., R. Co. v. Naylor*, 73 Ohio St. 115; 76 N. E. Rep. 505; *Baltimore, etc., R. Co. v. Baldwin*, 144 Fed. Rep. 53; *Alfson v. Bush Co.* 182 N. Y. 393; 75 N. E. Rep. 230; *Atchison, etc., R. Co. v. Fajardo*, 74 Kan. 314; 86 Pac. Rep. 301; *Tanoz v. Municipal, etc., Co.* 84 N. Y. Stat. 1053; 88 App. Div. 251; *Naylor v. Pittsburg, etc., R. Co.* 4 Ohio C. C. (N. S.) 437 (*contra*, *Cleveland, etc., R. Co. v. Osgood*, 36 Ind. App. 34; 70 N. E. Rep. 839); *Hirschkovitz v. Pennsylvania R. Co.* 138 Fed. Rep. 438.

of the suit.<sup>16</sup> But in the case of a widow, husband, child or parent no question of dependency is involved.<sup>17</sup>

**§ 108. Who are dependent on deceased.**—In the previous section it is said that a partial dependency on the deceased was all that was necessary. Who is dependent is, of course, a question of fact. An invalid sister who has received each month thirty or thirty-five dollars, is unable to pay her doctor bills or to work, and is, in fact, dependent upon her deceased brother, comes within the statute.<sup>18</sup> An indigent mother living with her unmarried son and depending upon him for support, is dependent upon him within the meaning of a statute similar to the one under discussion.<sup>19</sup> Where an aged father lived in a foreign country, was feeble, destitute, unable to work, and the deceased had many times sent him money, it was held that he was dependent on the deceased son.<sup>20</sup> But where it appeared that the alleged beneficiary was a half sister with two children, that the deceased came to see her at times and then usually gave her money, and sent her money every other week or so for her rent, and she had no other means of support, and since his death had supported herself, it was held that she was not dependent upon him, there being nothing to show the amount of her earnings or that she was, in fact, dependent upon him.<sup>21</sup> The question of dependency does not depend upon a strict legal right to it, as where a person because of some disability, and without property, was dependent on the deceased for support, and because of past support he had reasonable expectancy of the continuation if the deceased had lived.<sup>22</sup> And the fact that

<sup>16</sup> Savannah El. Co. v. Bell, 124 Ga. 663; 53 S. E. 109; Louisville, etc., R. Co. v. Jones (Fla.), 39 So. Rep. 485.

<sup>17</sup> Beaumont, etc., Co. v. Dillworth, 16 Tex. Civ. App. 257; 94 S. W. Rep. 352.

<sup>18</sup> Daly v. New Jersey, etc., R. Co. 155 Mass. 1; 29 N. E. Rep. 507.

<sup>19</sup> Bowerman v. Lackawanna,

etc., Co. (Mo. App.) 71 S. W. Rep. 1062.

<sup>20</sup> Boyle v. Columbia, etc., Co. 182 Mass. 93; 64 N. E. Rep. 726.

<sup>21</sup> Hodnett v. Boston, etc., R. Co. 156 Mass. 86; 30 N. E. Rep. 224.

<sup>22</sup> Louisville, etc., R. Co. v. Jones, 45 Fla. 407; 34 So. Rep. 246; United States, etc., Co. v. Sullivan, 22 App. Dec. 115.



the deceased had paid attentions to a young lady with a view to marriage does not even tend to show his parents were not dependent on him for support.<sup>23</sup> Where two brothers and a nephew, with whom deceased lived and did housework they were held entitled to recover, though there was no legal obligation on her part to support them.<sup>24</sup> The fact that the beneficiary is a married woman will not defeat her right of action where she does not live with her husband, is not supported by him but was, in fact, dependent on the deceased.<sup>25</sup> And the fact that the beneficiary is supported by others after the death of the deceased does not prevent a recovery.<sup>26</sup> The fact of dependency must be established by the plaintiff<sup>27</sup> for there can be no recovery unless that be shown.<sup>28</sup>

§ 109. **Bastard.**—A suit for the benefit of a bastard where its reputed father has been killed cannot be maintained; for he is not of "kin" to the reputed father.<sup>29</sup> And it has been held that the mother of an illegitimate child cannot recover for its death,<sup>30</sup> though it is believed that this is an incorrect decision, and the contrary has been held.<sup>31</sup>

<sup>23</sup> *Futz v. Western U. T. Co.* 25 Utah, 263; 71 Pac. Rep. 209.

<sup>24</sup> *Smith v. Michigan, etc., R. Co.* 35 Ind. App. 188; 73 N. E. Rep. 928.

<sup>25</sup> *International, etc., R. Co. v. Boykin*, 32 Tex. Civ. App. 72; 85 S. W. Rep. 1163.

<sup>26</sup> *McDaniels v. Royle, etc., Co.* 110 Mo. App. 706; 85 S. W. Rep. 679.

<sup>27</sup> *Willis, etc., Co. v. Grizzell*, 198 Ill. 313; 65 N. E. Rep. 74; *Missouri, etc., R. Co. v. Freeman* (Tex. Civ. App.), 73 S. W. Rep. 542.

<sup>28</sup> *Swift & Co. v. Johnson*, 138 Fed. Rep. 867; *Diller v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271.

<sup>29</sup> *McDonald v. Pittsburg, etc., R. Co.* 144 Ind. 459; 43 N. E. Rep. 447; *Thornburgh v. American, etc., Co.* 141 Ind. 443; 40 N. E. Rep. 1062; *Dickinson v. Northeastern R. Co.* 2 H. & C. 735; 33 L. J. Exch. 91; 9 L. T. (N. S.) 299; 12 W. R. 52; *Good v. Towns*, 56 Vt. 410.

<sup>30</sup> *Harkins v. Philadelphia*, 15 Phila. 286. See *Marshall v. Wabash R. Co.* 46 Fed. Rep. 269; *Robinson v. Georgia R., etc., Co.* 117 Ga. 168; 43 S. E. Rep. 452; *Runt v. Illinois, etc., R. Co.* 88 Miss. 575; 41 So. Rep. 1; *McDonald v. Southern R. Co.* 71 S. C. 352; 51 S. E. Rep. 138.

<sup>31</sup> *Muhl v. Southern M. R. Co.* 10 Ohio St. 272.

§ 110. **Emancipated child.**—The fact that the child of the deceased father has been emancipated is no defense.<sup>32</sup> Nor is it a bar to the action that the child was not living with the father at his death,<sup>33</sup> or its custody awarded to the divorced wife.<sup>34</sup>

§ 111. **Adopted child.**—It has been held that an adopting father could sue for the death of his adopted child,<sup>35</sup> and it would seem that suit could be brought for the death of the adopting father where such adopted child was the sole beneficiary. Yet it has been held that such a child is not "next of kin."<sup>36</sup> But a child that had been merely given to the deceased cannot be treated as a beneficiary, not being of kin.<sup>37</sup>

§ 112. **Posthumous child.**—The action may be brought for the benefit of a child *en ventre sa mere* at the time of its father's death.<sup>38</sup> Such a child is a "surviving child."<sup>39</sup>

§ 113. **Beneficiaries must survive deceased—Complaint.**—If there be no person alive designated as a beneficiary by the statute, then no action can be maintained. The survival of

<sup>32</sup> *Mattock v. Williamsville, etc.*, R. Co. (Mo.) 95 S. W. Rep. 849.

<sup>33</sup> *Gulla v. Lehigh, etc., Co.* 28 Pa. Super. Ct. 11.

<sup>34</sup> *Taylor v. San Antonio, etc., Co.* 15 Tex. Civ. App. 344; 93 S. W. Rep. 674.

<sup>35</sup> *Thornburgh v. American, etc., Co.* 141 Ind. 443; 40 N. E. Rep. 1062.

<sup>36</sup> *Heidcamp v. Jersey City, etc., R. Co.* 69 N. J. L. 284; 55 Atl. Rep. 239.

<sup>37</sup> *Elwood St. Ry. Co. v. Cooper*, 22 Ind. App. 459; 53 N. E. Rep. 1092; *Elwood St. Ry. Co. v. Ross*, 26 Ind. App. 258; 58 N. E. Rep. 535.

<sup>38</sup> *State v. Soale*, 36 Ind. App. 73; 74 N. E. Rep. 1111 (sale of intoxicating liquors to the father, resulting in his death); *Quinlen v. Welch*, 69 Hun, 584; 23 N. Y. Supp. 963; *Thelluson v. Woodford*, 4 Ves. 227; 11 Ves. 112.

<sup>39</sup> *Nelson v. Galveston, etc., Ry. Co.* 78 Tex. 621; 14 S. W. Rep. 1021; *Texas, etc., Ry. Co. v. Robertson*, 82 Tex. 657; 17 S. W. Rep. 1041; *The George and Richard, L. R. Ad. & Ecc.* 466; 24 L. T. (N. S.) 717; 20 Weekly Rep. 245; *Galveston, etc., R. Co. v. Contreras*, 31 Tex. Civ. App. 489; 73 S. W. Rep. 1051.

a beneficiary is essential to the maintenance of the cause of action.<sup>40</sup> It is, therefore, essential for the administrator to show that a person survived the deceased employe who was then a beneficiary; and if he do not, his complaint or declaration will be insufficient;<sup>41</sup> and if it do not contain an allegation of that fact, the judgment will be subject to a motion to arrest it.<sup>42</sup>

**§ 114. Statute of limitations.**—The action must be brought within two years after the death of the injured person,<sup>43</sup>

<sup>40</sup> *Koenig v. City of Covington* (Ky.), 17 S. W. Rep. 128; *Cincinnati, etc., R. Co. v. Pratt*, 92 Ky. 233; 17 S. W. Rep. 484; *Kentucky, etc., R. Co. v. McGinty*, 12 Ky. L. Rep. 482; 14 S. W. Rep. 601; *Louisville, etc., R. Co. v. Coppage* (Ky.), 13 S. W. Rep. 1086; *Kentucky, etc., R. Co. v. Wainwright* (Ky.), 13 S. W. Rep. 438; *Cincinnati, etc., R. Co. v. Adam* (Ky.), 13 S. W. Rep. 428; *Louisville, etc., R. Co. v. Merriweather* (Ky.), 12 S. W. Rep. 935; *Conley v. Cincinnati, etc., R. Co.* (Ky.) 12 S. W. Rep. 764; *Henning v. Louisville, etc., Co.* (Ky.) 12 S. W. Rep. 550; *Wiltzie v. Town of Linden*, 77 Wis. 152; 46 N. W. Rep. 234; *Woodward v. Chicago, etc., R. Co.* 23 Wis. 400; *Serensen v. Northern Pac. Ry. Co.* 45 Fed. Rep. 407; *Lilly v. Charlotte, etc., R. Co.* 32 S. C. 142; 10 S. E. 932; *Warren v. Englehart*, 13 Neb. 283; 13 N. W. Rep. 401; *Conlin v. City of Charleston*, 15 Rich. L. 201; *Burlington, etc., R. Co. v. Crockett*, 17 Neb. 570; 14 N. W. Rep. 219.

<sup>41</sup> *Stewart v. Terre Haute, etc., R. Co.* 103 Ind. 44; 2 S. E. Rep. 208; *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691; 71 N. E. Rep. 166; *Lamphear v. Buckingham*, 33 Conn. 237; *Indianapolis,*

*etc., R. Co. v. Keely*, 23 Ind. 133; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Chicago, etc., R. Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Conant v. Griffin*, 48 Ill. 410; *Clore v. McIntire*, 120 Ind. 262; 22 N. E. Rep. 128; *Missouri Pac. Ry. Co. v. Barber*, 44 Kan. 612; 24 Pac. Rep. 969; *Safford v. Drew*, 3 Duer. 627; *Geroux v. Graves*, 62 Vt. 280; 19 Atl. Rep. 987; *Lucas v. New York, etc., R. Co.* 21 Barb. 245; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225; 28 Pac. Rep. 233; *Westcott v. Central Vt. R. Co.* 61 Vt. 638; 17 Atl. Rep. 745; *Schwarz v. Judd*, 28 Minn. 371; 10 N. W. Rep. 208; *East Tennessee, etc., Ry. Co. v. Lilly*, 90 Tenn. 563; 18 S. W. Rep. 118; *Barnum v. Chicago, etc., R. Co.* 30 Minn. 461; 16 N. W. Rep. 364.

<sup>42</sup> *Stewart v. Terre Haute*, 103 Ind. 44; 2 N. E. Rep. 208.

<sup>43</sup> *Goodwin v. Bodean, etc., Co.* 109 La. 1050; 34 So. Rep. 74; *County v. Pacific, etc., Co.* 68 N. J. L. 273; 53 Atl. Rep. 386; *Staunton Coal Co. v. Fischer*, 119 Ill. App. 284; *Dare v. Wabash, etc., R. Co.* 119 Ill. App. 256; *Crape v. Syracuse*, 183 N. Y. 395; 76 N. E. Rep. 465; *Winfree v. Northern Pac. Ry. Co.* 173 Fed. 65.

and the time is not extended by the pendency and dismissal of a former action as allowed by some codes in the ordinary cases.<sup>44</sup> The statute requiring the action to be brought within two years is not, strictly speaking, a statute of limitations, which must be specially pleaded, but is an absolute bar, not removable by any of the ordinary exceptions of that statute.<sup>45</sup> "This is not strictly a statute of limitations," said the Supreme Court of North Carolina. "It gives a right of action that would not otherwise exist. \* \* \* It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing, as there is no saving clause as to the time within which the action must be begun."<sup>46</sup> "The time within which the suit must be brought," said Chief Justice Waite, "operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." "The liability and the remedy [in admiralty] are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."<sup>47</sup> It follows from those statements that if the complaint shows the action was not brought within the two years, it is demurrable.<sup>47\*</sup> No exception can be alleged to excuse the delay.<sup>48</sup> The statute provides that the action must be "commenced within two years from the

<sup>44</sup> *Rodman v. Missouri Pac. Ry. Co.*, 65 Kan. 645; 70 Pac. Rep. 612; 59 L. R. A. 704; *Cavanagh v. Ocean, etc., Co.* 13 N. Y. Supp. 540; 9 N. Y. Supp. 198; 11 N. Y. Supp. 547; 12 N. Y. Supp. 609; *Boyd v. Clerk*, 8 Fed. Rep. 849.

<sup>45</sup> *Hill v. New Haven*, 37 Vt. 501; *Landigan v. New York, etc., R. Co.* 5 Civ. Proc. Rep. (N. Y.) 76; *Bonnell v. Jowett*, 24 Hun. 524.

<sup>46</sup> *Taylor v. Cranberry, etc., Co.* 94 N. C. 525; *Best v. Town of*

*Kingston*, 106 N. C. 205; 10 S. E. Rep. 997.

<sup>47</sup> *The Harrisburg*, 119 U. S. 199; 7 Sup. Ct. Rep. 199; 30 L. Ed. 358; reversing 15 Fed. Rep. 610.

<sup>47\*</sup> *Hanna v. Jeffersonville R. Co.* 32 Ind. 113; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *George v. Chicago, etc., R. Co.* 51 Wis. 603; 8 N. W. Rep. 374.

<sup>48</sup> *Hill v. New Haven*, 37 Vt. 501.

day the cause of action accrued." Where the employe is instantly killed, the cause of action accrues at once and the statute immediately begins to run.<sup>49</sup> In some states it has been held that the statute does not begin to run until an administrator has been appointed;<sup>50</sup> but directly the opposite has also been held.<sup>51</sup> An amendment of the complaint may be made after the two years have expired, if it does not state a new cause of action.<sup>52</sup> An important question is presented where the injured employe does not die because of his injuries until some time after he has received them—a year, for instance. Must the action be brought within two years from the date of his injury or within two years from the date of his death? A little consideration of this question will show that the suit can be brought within two years after the death and that the date of the injury is immaterial in this respect. While the injured person was alive he could have no administrator, nor could his parents, wife, children or next of kin dependent upon him bring an action because of his injuries; and if he brought the action he would be entitled to the damages recovered and not they. So much so is this true that if he brought the action and then died before verdict or judgment his administrator cannot be substituted as plaintiff, but must bring a new action. The administrator's right of action is a new and independent one, and is not a survival of the deceased's cause of action.<sup>53</sup>

<sup>49</sup> *Hanna v. Jeffersonville R. Co.* 32 Ind. 113.

<sup>50</sup> *Andrews v. Hartford, etc., R. Co.* 34 Conn. 57; *Sherman v. Western Stage Co.* 24 Iowa, 515; see *Louisville, etc., R. Co. v. Sanders*, 86 Ky. 259; 5 S. W. Rep. 563.

<sup>51</sup> *Fowlkes v. Nashville, etc., R. Co.* 5 Baxt. 663; 9 Heisk. 829; see *Bledsoe v. Stokes*, 1 Baxt. 312, and *Flatley v. Memphis, etc., R. Co.* 9 Heisk. 230.

<sup>52</sup> *City of Bradford v. Downs*,

126 Pa. St. 622; 17 Atl. Rep. 884; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Kuhns v. Wisconsin, etc., Ry. Co.* 76 Iowa, 67; 40 N. W. Rep. 92; *Moody v. Pacific R. Co.* 68 Mo. 470; *Daley v. Boston, etc., R. Co.* 147 Mass. 101; 16 N. E. Rep. 690.

<sup>53</sup> *Dillier v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271; *Hilliker v. Citizens St. Ry. Co.* 152 Ind. 86; 52 N. E. Rep. 607; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E.



It necessarily follows that the statute begins to run from the date of the death of the injured person.

§ 115. **Who brings the action in case of death.**—In case of the death of the injured person before he brings an action, only his personal representatives can bring the action. Of course, personal representative means his administrator or executor. The cause of action is given by statute, and only the person to whom it is given can bring the action to recover damages; and the statute has named that personal representative or that person. Even though there be no widow or husband and children or parents, and no personal representative, the "next of kin" cannot maintain the action.<sup>53a</sup> If the deceased has brought suit and then dies, only his personal representatives can prosecute it to judgment.<sup>53b</sup>

Rep. 419; *Malott v. Shimer*, 153 Ind. 35; 54 N. E. Rep. 101; *Hedekin v. Gillespie*, 33 Ind. App. 650; 72 N. E. Rep. 143; *All v. Barnwell County*, 29 S. C. 161; 7 S. E. Rep. 58.

<sup>53a</sup> *Fithian v. St. Louis & S. F. Ry. Co.* 188 Fed. 842; *Thompson v. Wabash Ry. Co.* 184 Fed. 554.

<sup>53b</sup> As to right of an alien to recover damages, we make the following extract from *Cetofonte v. Camden Coke Co.* 78 N. J. 662; 75 Atl. 913, holding that he may:

"There is much conflict in the cases arising in other jurisdictions under somewhat similar statutes, both in this country and England, upon this question. The great weight of authority, however, supports the proposition that nonresident aliens are not excluded from among the beneficiaries. The leading case is *Mulhall v. Fallon*, 176 Mass. 266; 57 N. E. 386. That is followed by *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215; 63 N. E. 94; *Szymanski v. Blumenthal*, 3

*Pennewill (Del.)* 558, 52 Atl. 347; *Renlund v. Commodore Min. Co.* 89 Minn. 41; 93 N. W. 1057; *Bonthron v. Phoenix Light & Fuel Co.* 8 Ariz. 129; 71 Pac. 941; *Romano v. Capital City Brick Co.* 125 Iowa, 591; 101 N. W. 437; *Cleveland, C. C. & St. L. R. Co. v. Osgood*, 36 Ind. App. 34; 73 N. E. 285; *Pocahontas Collieries Co. v. Rukas' Admr.*, 104 Va. 278; 51 S. E. 449; *Alfson v. Bush Co.* 182 N. Y. 393; 75 N. E. 230; *Pittsburg C., C. & St. L. R. Co. v. Naylor*, 73 Ohio St. 115; 76 N. E. 505; *Trotta v. Johnson*, 121 Ky. 827; 90 S. W. 540; *Atchison, T. & S. F. R. Co. v. Fajardo*, 74 Kan. 314; 86 Pac. 301; *Patek v. American Smelting Co.* 154 Fed. 190; 83 C. C. A. 284; *Vetaloro v. Perkins (C. C.)* 101 Fed. 393; *Davidson v. Hill (1901)*, 2 K. B. 606, disapproving *Adams v. British & F. S. S. Co. (1898)* 2 Q. B. 430. The cases holding the contrary view, *i. e.*, that nonresident aliens are excluded as beneficiaries, are *Deni v. Pennsylvania*

R. Co. 181 Pa. 525; 37 Atl. 558; *Maiorano v. Baltimore & O. R. Co.* 216 Pa. 402; 65 Atl. 1077; *McMillan v. Spider Lake Sawmill & Lumber Co.* 115 Wis. 332; 91 N. W. 979; *Brannigan v. Union Gold Min. Co. (C. C.)* 93 Fed. 164; *Adams v. British & F. S. S. Co.* 2 Q. B. 430, which latter case as we have pointed out, has been disapproved in England. The reasoning upon which these latter cases rest seems to be that (1) the laws of a country have no intrinsic force *proprio vigore* beyond its territorial jurisdiction and limits; (2) statutes generally apply to those only who owe obedience to the legislature which enacts them, and whose interests it is its duty to protect; and (3) it is usual in conceding or granting rights to nonresident aliens to make express mention of them.

"But we think the better reason, as well as the greater weight of adjudged cases forbids that nonresident aliens be excluded, by interpretation, from among the beneficiaries designated in the statute. The decedent, though a foreigner not being an alien enemy, if he had survived the injury, might have maintained an action therefor, if not otherwise specially disabled by law. (2 Cyc. 107.) The wife, having a vested right in the cause of action resulting from his death, should not be excluded as a beneficiary, though a nonresident alien. The injury to her may well be the same as if she were a resident. The legislature had power to include nonresident aliens, and they are within the natural and ordinary import of the language employed. Neither the context nor the corrective purpose of the statute suggests any reason for a restrictive interpretation. The act is in its highest sense remedial, and

is entitled to receive the liberal construction which appertains to such statutes. (*Haggerty v. Central Railroad Co.* 31 N. J. Law, 349; *Gottlieb v. North Jersey St. Ry. Co.* 72 N. J. Law, 480; 63 Atl. 339.) The question of giving a statute intrinsic force *proprio vigore* beyond the territorial jurisdiction of the state is not involved. The act merely removes a common-law obstacle to recovery for a wrongful act. It merely provides a remedy for a wrong, committed within the state, by those within the state and subject to its authority, to others within its jurisdiction and entitled to its protection, whereby injury is done to still others within or without its jurisdiction. Had the legislature intended to restrict recovery to a resident widow or resident next of kin or both, or to a widow and next of kin who are citizens of the United States, it would have so said. Moreover, our statute has been under consideration in the United States courts. In *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. Ed. 439, in denying a contention that the provisions of the act that 'every such action shall be brought by and in the names of the personal representatives of such deceased' limited the right of action to a personal representative appointed in the state it was said: "The advocates of this view interpolate into the statute what is not there. . . . The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, 'if they reside in the State of New Jersey?' It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference, it is opposed to it. The first section makes the liability

§ 11C. **Complaint.**—It is clear that the complaint or declaration must show that persons were alive, at least at the time of the death of the injured person, who come within some one of the clauses of the statute, and who would be entitled to the damages recovered; and this fact must be supported by proof.<sup>54</sup> If the names of those entitled to share in the damages be given, it is not necessary to show there are no such others.<sup>55</sup> While it is proper to allege facts showing a pecuniary loss to the beneficiaries,<sup>56</sup> yet that is not necessary, for the court will presume damages followed.<sup>57</sup> It need not be averred that there was an immediate death, an averment of a mediate death being sufficient.<sup>58</sup> The complaint must show the plaintiff's capacity to sue.<sup>59</sup> It must also show the same facts, except the matter of damages, the deceased would have been required to allege if he had when alive brought

of the corporation or person absolute where death arises from their negligence. Who shall say that it depends upon the appointment of an administrator within the state? In *Hirschkovitz v. Pennsylvania R. Co.* (C. C.) 138 Fed. 438, the court, construing our statute, held that a nonresident alien who is next of kin to the person killed is entitled to the benefit of a statute giving a right of action for the death of a person caused by the wrongful act or negligence of another. It will be seen, therefore, that the United States courts in the construction of our statute are in harmony with the views here expressed.

"The judgment of the court below will be affirmed."

<sup>54</sup> *Webster v. Norwegian Min. Co.* 137 Cal. 399; 70 Pac. Rep. 276; *Oulighan v. Butler*, 189 Mass. 287; 75 N. E. Rep. 726; *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691; 71 N. E. Rep. 166; *St. Louis, etc., R. Co. v. Black*, 79 Ark. 179; 95 S. W.

Rep. 155; *Southern R. Co. v. Maxwell*, 113 Tenn. 464; 82 S. W. Rep. 1137; *Chicago, etc., R. Co. v. Kinmare*, 115 Ill. App. 132.

<sup>55</sup> *Peers v. Nevada, etc., Co.* 119 Fed. Rep. 400; *Barnes v. Ward*, 9 C. B. 392.

<sup>56</sup> *Union Pac. R. Co. v. Roeser* 69 Neb. 62 95 N. W. Rep. 68.

<sup>57</sup> *Peers v. Nevada, etc., Co.* 19 Fed. Rep. 400; *Peden v. American Bridge Co.* 120 Fed. Rep. 523; *Kenney v. New York, etc., Co.* 49 Hun, 535; 2 N. Y. Supp. 512; *Wescott v. Central Vt. R. Co.* 61 Vt. 438; 17 Atl. Rep. 745; *Barnum v. Chicago, etc., R. Co.* 30 Minn. 461; 16 N. W. Rep. 364; *Kelley v. Chicago, etc., R. Co.* 50 Wis. 381; 7 N. W. Rep. 291; *Korrad v. Lake Shore, etc., R. Co.* 131 Ind. 261; 29 N. E. Rep. 1069; *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634; 58 N. E. Rep. 1040.

<sup>58</sup> *Carrigan v. Stillwell*, 97 Me. 247; 54 Atl. Rep. 389; 61 L. R. A. 163.

<sup>59</sup> *Martin v. Butte*, 34 Mont. 281; 86 Pac. Rep. 264.

a suit to recover damages for the same injury.<sup>60</sup> It need not be alleged that the damages had not been paid.<sup>61</sup> It must be shown that the injured person had died;<sup>62</sup> but it need not necessarily be proven of the precise date alleged when it took place.<sup>63</sup> It is, in fact, not necessary to set out the names of the beneficiaries, it being sufficient to allege that he left a parent, or wife or children or next of kin (perhaps stating they were brothers, sisters or cousins) dependent upon him;<sup>64</sup> though the better practice is to name them.<sup>65</sup> It is not fatal to describe some as beneficiaries who are not if others be named who are.<sup>66</sup> Where a complaint alleged the deceased left as his "only heirs at law" a father and mother, it was held not necessary to allege he left neither wife nor children.<sup>67</sup> The appointment of the plaintiff as administrator need not be expressly alleged, where he brings the suit in his representative capacity.<sup>68</sup> In jurisdictions where it has been necessary to allege that a plaintiff was without fault contributing to the injuries, it has been

<sup>60</sup> *Trott v. Birmingham R. Co.* 144 Ala. 383; 39 So. Rep. 716; *Rosney v. Erie R. Co.* 124 Fed. Rep. 90; *Birmingham, etc., Ry. Co. v. Gunn*, 141 Ala. 372; 37 So. Rep. 329; *Dorsey v. Columbus R. Co.* 121 Ga. 697; 49 S. E. Rep. 698; *United, etc., Co. v. State*, 100 Md. 634; 60 Atl. Rep. 248.

<sup>61</sup> *Louisville, etc., R. Co. v. Summers*, 125 Fed. Rep. 719.

<sup>62</sup> *Denver, etc., R. Co. v. Gunning*, 33 Colo. 280; 80 Pac. Rep. 727.

<sup>63</sup> *International, etc., R. Co. v. Glover*, 13 Tex. Civ. App. 263; 88 S. W. Rep. 515.

<sup>64</sup> *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Dugan v. Meyers*, 30 Ind. App. 237; 65 N. E. Rep. 1046; *Commercial Club v. Hilliker*, 20 Ind. App. 239; 50 N. E. Rep. 578; *Korrady v. Lake*

*Shore, etc., R. Co.* 131 Ind. 261; 29 N. E. Rep. 1069; *Clore v. McIntire*, 120 Ind. 262; 22 N. E. Rep. 128; *Conant v. Griffin*, 48 Ill. 410; *Howard v. Delaware, etc., R. Co.* 40 Fed. Rep. 195.

<sup>65</sup> *Pennsylvania Co. v. Coyer*, 163 Ind. 631; 72 N. E. Rep. 875; *Barnum v. Chicago, etc., R. Co.* 30 Minn. 461; 16 N. W. Rep. 364.

<sup>66</sup> *Clore v. McIntire*, 120 Ind. 262; 22 N. E. Rep. 128; *Korrady v. Lake Shore, etc., R. Co.* 131 Ind. 261; 29 N. E. 1069.

<sup>67</sup> *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691; 71 N. E. Rep. 166.

<sup>68</sup> *Chicago, etc., R. Co. v. Cummins*, 24 Ind. App. 192; 53 N. E. Rep. 1026; *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350; 9 So. Rep. 870; *Bowler v. Lane*, 9 Met. (Ky.) 311.



held not necessary to allege that the administrator, or even the beneficiaries, were free from fault,<sup>69</sup> but under the present statute even this allegation is not necessary. If the complaint does set out the names of the beneficiaries, proof as to their sex is immaterial.<sup>70</sup> The appointment of the plaintiff as administrator is not put in issue by a general denial, and so need not be proven.<sup>71</sup> An amendment is allowable which adds different allegations in respect to the defendant's negligence,<sup>72</sup> or more particulars,<sup>73</sup> or adds an allegation that the deceased left a wife and children.<sup>74</sup>

§ 117. **Damages by way of solatium.**—Damages cannot be allowed by way of **solatium** for the grief and wounded feelings of the beneficiaries.<sup>75</sup>

§ 118. **Damages for suffering of deceased—Medical and funeral expenses.**—Damages cannot be recovered for the

<sup>69</sup> Chicago, etc., R. Co. v. La Porte, 33 Ind. App. 691; 71 N. E. Rep. 166.

<sup>70</sup> O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. Rep. 269.

<sup>71</sup> Ewen v. Chicago, etc., R. Co. 38 Wis. 613; Union Ry., etc., Co. v. Shacklet, 119 Ill. 232; 10 N. E. Rep. 896.

If his letters of administration have been revoked, that fact must be put in issue by a special plea. Burlington, etc., R. Co. v. Crockett, 17 Neb. 570; 24 N. W. Rep. 219.

<sup>72</sup> Daley v. Boston, etc., R. Co. 147 Mass. 101; 16 N. E. Rep. 690.

<sup>73</sup> Harris v. Central R. Co. 78 Ga. 525; 3 S. E. Rep. 355.

<sup>74</sup> South Carolina R. Co. v. Nix, 68 Ga. 572; see Haynie v. Chicago, etc., R. Co. 9 Ill. App. 105.

<sup>75</sup> Blake v. Midland Ry. Co. 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562; Illinois Cent. R. Co. v. Barron, 5 Wall. 90; 18 L. Ed. 591;

affirming 1 Biss. 453; Fed. Cas. No. 1,053; Wharton v. Chicago, etc., R. Co. 2 Biss. 282; S. C. 13 Wall. 270; Kansas Pacific Ry. Co. v. Cutter, 19 Kan. 93; State v. Baltimore, etc., Ry. Co. 24 Md. 84; City of Chicago v. Scholten, 75 Ill. 468; Little Rock, etc., Ry. Co. v. Barker, 33 Ark. 350; Mynning v. Detroit, etc., Co. 59 Mich. 257; 26 N. W. Rep. 514; Hutchins v. St. Paul, etc., R. Co. 44 Minn. 5; 46 N. W. Rep. 79; Anderson v. Chicago, etc., R. Co. 35 Neb. 95; 52 N. W. Rep. 840; Besenecker v. Sale, 8 Mo. App. 211; Tilley v. Hudson, etc., Co. 29 N. Y. 252; 24 N. Y. 471; Pennsylvania Co. v. Zebe, 33 Pa. St. 318; March v. Walker, 48 Tex. 375; Louisville, etc., R. Co. v. Rush, 127 Ind. 545; 26 N. E. Rep. 1010; Morgan v. Southern Pac. R. Co. 95 Cal. 510; 30 Pac. Rep. 603; Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105.



physical and mental suffering of the deceased;<sup>76</sup> nor can they be recovered for medical and funeral expenses.<sup>77</sup> But if the deceased has brought an action to recover damages, and then dies, and his personal representative continues it, only such damages as the deceased would have recovered can be awarded.

**§ 119. Measure of damages.**—It will be observed that the statute does not undertake to fix a limit as to the amount of damages recoverable. Therefore, the courts are at liberty to apply the usual rules followed in such instances. The question is, "What loss did the beneficiaries suffer by the death of the deceased?" In ascertaining that loss the age of the deceased, his earning capacity, his probable earnings, his habits of industry, his drinking habits, and any other fact bearing upon his capacity to furnish the beneficiaries a livelihood may be considered.<sup>78</sup> The special aptitude of the de-

<sup>76</sup> *Blake v. Midland Ry. Co.* 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90; 18 L. Ed. 591; affirming 1 Biss. 453; Fed. Cas. No. 1053; *Railroad Co. v. Whitton*, 13 Wall. 270; 20 L. Ed. 571; affirming 2 Biss. 282; Fed. Cas. No. 17,597; *Oldfield v. New York, etc., R. Co.* 14 N. Y. 310; *Donaldson v. Mississippi, etc., R. Co.* 18 Iowa, 280; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Potter v. Chicago, etc., R. Co.* 21 Wis. 372; *Southern, etc., Co. v. Bradley*, 52 Tex. 587; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83.

<sup>77</sup> *Dolton v. South Eastern R. Co.* 4 C. B. (N. S.) 296; 4 Jur. (N. S.) 711; 27 L. J. C. P. 227.

It has been argued that the administrator may recover the same damages the deceased em-

ployee would have recovered if he had pressed his cause of action to judgment before his death. But that argument was based upon a desire or effort to show that the administrator's cause of action accrued when the injury was inflicted and not when death supervened, and thus enable the defendant employer to take advantage of the statute of limitations when he could not do so if the cause of action did not accrue to the administrator until death occurred.

<sup>78</sup> *Vreeland v. Michigan Central R. Co.* 189 Fed. 495; *Kaght v. Sadtler, etc., Co.* 91 Mo. App. 574; *St. Louis, etc., Ry. Co. v. Bowles* (Tex. Civ. App.), 72 S. W. Rep. 451; *Watson v. Seaboard, etc., R. Co.* 133 N. C. 188; 45 S. E. Rep. 555; *Davidson, etc., Co. v. Severson*, 109 Tenn. 572; 72 S. W. Rep.

ceased for a particular trade may be considered.<sup>79</sup> So his health may be shown as bearing upon his earning capacity.<sup>80</sup> His disposition to contribute to the support of those dependent upon him, or to that of his wife, children or parents, is a factor to be considered.<sup>81</sup> In the case of a widow, at least, the amount of damages she suffered may be based upon the length of time the deceased would probably have lived;<sup>82</sup> and this is not affected by her subsequent marriage.<sup>83</sup> Where the deceased had a child, the value of his services for the care and education of such child may be taken into consideration,<sup>84</sup> as well as his probable increase of earning power.<sup>85</sup> Where the wife is the beneficiary, the measure of damages is the probable amount she would have received if he had lived and not his probable earnings.<sup>86</sup> If the beneficiaries are next of kin dependent upon him, proof of mere relationship is not sufficient; the actual fact of expectancy must be shown.<sup>87</sup>

967; *Neal v. Wilmington, etc., Co.*, 3 Penn. (Del.) 467; *Carter v. North Carolina R. Co.*, 139 N. C. 499; 52 S. E. Rep. 642; *Beaumont, etc., R. Co. v. Dilworth*, 16 Tex. Civ. App. 257; 94 S. W. Rep. 352; *Knott v. Peterson*, 125 Ia. 404; 101 N. W. Rep. 173; *San Antonio, etc., R. Co. v. Brock* (Tex. Civ. App.), 80 S. W. Rep. 422.

<sup>79</sup> *Snyder v. Lake Shore, etc., Ry. Co.*, 131 Mich. 418; 91 N. W. Rep. 643; *Evarts v. Santa Barbara, etc., R. Co.* (Cal. App.); 86 Pac. Rep. 830; *Reiter, etc., Co. v. How*, 144 Ala. 192; 40 So. Rep. 280.

<sup>80</sup> *Gadley, etc., Co. v. Carter*, 65 Kan. 565; 70 Pac. Rep. 635.

<sup>81</sup> *Fajardo v. New York Cent. R. Co.*, 84 N. Y. App. Div. 354.

<sup>82</sup> *Cox v. Wilmington, etc., Ry. Co.*, 4 Penn. 162 (Del.); 53 Atl. Rep. 569.

<sup>73</sup> *Consolidated Store Co. v. Morgan*, 160 Ind. 241; 66 N. E. Rep. 696; *Chicago, etc., R. Co. v. Driscoll*, 207 Ill. 9; 69 N. E. Rep.

620; but see *Hewill v. East, etc., Co.* (Mich.) 98 N. W. Rep. 992.

<sup>84</sup> *Cameron, etc., Co. v. Anderson*, 98 Tex. 156; 81 S. W. Rep. 282.

Mortality tables may be based on the expectancy of life. *Mix v. Hamburg, etc., Co.*, 85 N. Y. App. Div. 475; 83 N. Y. St. 322; *Knott v. Peterson*, 125 Ia. 404; 101 N. W. Rep. 524; *Fl. Worth, etc., R. Co. v. Linthicum*, 33 Tex. Civ. App. 375; 77 S. W. Rep. 40.

<sup>85</sup> *Halverson v. Seattle El. Co.*, 35 Wash. 600; 77 Pac. Rep. 1058; *Farnes v. Columbia Lead Co.*, 107 Mo. App. 608; 82 S. W. Rep. 203.

<sup>86</sup> *Reed v. Queen Anne R. Co.*, 4 Penn. (Del.) 413; 57 Atl. Rep. 529; *Houston, etc., R. Co. v. Turner*, 34 Tex. Civ. App. 397; 78 S. W. Rep. 712 (jury to consider whether a less sum presently paid would compensate her.)

<sup>87</sup> *Standard, etc., Co. v. Munsey*, 33 Tex. Civ. App. 416; 76 S. W. Rep. 931.

Declarations of deceased evincing a probable support are admissible.<sup>88</sup> If the suit is for the loss of a wife, the husband being the beneficiary, the fact of his remarriage cannot be shown.<sup>89</sup> The jury must determine the amount of the loss, and to do this may apply their own observation, experience and knowledge to the circumstances of the case;<sup>90</sup> but they must confine themselves to the evidence.<sup>91</sup> The expectancy of the life of the deceased may be shown;<sup>92</sup> but to show this the longevity of the father or mother of the deceased cannot be shown.<sup>93</sup> If the beneficiaries are dependent upon the deceased, then their expectancy in life may be shown.<sup>94</sup> The fact that the deceased father may have become impoverished if he had lived, and thus a burden to his children, need not be considered by the jury.<sup>95</sup> It cannot be shown what would be the cost of an annuity bond on the deceased's expectancy of life which would be sufficient to produce an annual income equal to his annual income at the time of his death.<sup>96</sup> In case of the death of a parent leaving a minor child, the child's loss of care, education, support and moral training is a subject for the jury's consideration;<sup>97</sup> and it may also be shown in defense that he had abandoned it;<sup>98</sup> or his solicitude

<sup>88</sup> *Gulf, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 269; 76 S. W. Rep. 794.

<sup>89</sup> *International, etc., Ry. Co. v. Boykin* (Tex. Civ. App.) 85 S. W. Rep. 1163; *St. Louis, etc., R. Co. v. Cleere* (Ark.) 88 S. W. Rep. 995 (a wife remarriage.)

<sup>90</sup> *Denver, etc., R. Co. v. Gunnig*, 33 Colo. 280; 80 Pac. Rep. 727; *Utah, etc., Co. v. Diamond, etc., Co.* 26 Utah, 299; 73 Pac. Rep. 524.

<sup>91</sup> *Cleveland, etc., R. Co. v. Drumm*, 32 Ind. App. 547; 70 N. E. Rep. 286.

<sup>92</sup> *Coffeyville, etc., Co. v. Carter*, 65 Kan. 565; 70 Pac. Rep. 635; *Haines v. Pearson*, 100 Mo. App. 551; 75 S. W. Rep. 194; *Jones v.*

*Kansas City*, 178 Mo. 528; 77 S. W. Rep. 890.

<sup>93</sup> *Hinsdale v. New York, etc., R. Co.* 81 N. Y. App. Div. 617.

<sup>94</sup> *The Dauntless*, 121 Fed. Rep. 420.

<sup>95</sup> *Stemples v. Metropolitan St. Ry. Co.* 174 N. Y. 512; 66 N. E. Rep. 1117.

<sup>96</sup> *Hinsdale v. New York, etc., R. Co.* 81 N. Y. App. Div. 617.

<sup>97</sup> *Ganoche v. Johnson, etc., Co.* 116 Mo. App. 596; 92 S. W. Rep. 918; *Beaumont, etc., Co. v. Dilworth*, 16 Tex. Ct. Rep. 257; 94 S. W. Rep. 352; *Texas, etc., R. Co. v. Green*, 15 Tex. Ct. Rep. 133; 95 S. W. Rep. 694.

<sup>98</sup> *Beaumont, etc., Co. v. Dilworth*, *supra*.

for its moral training.<sup>99</sup> In case of the death of a minor child, the value of his services until maturity may be recovered;<sup>100</sup> and it may be shown that he was obedient, industrious and economical.<sup>101</sup> But it should be observed that the damages to the child are not limited to those which accrued during his minority.<sup>102</sup> If a parent is the beneficiary, then damages may be awarded for reasonable expectation of the parent of benefits that might have accrued for the services and society of the deceased child;<sup>103</sup> but not for grief or anguish to the parent nor for sufferings of the child.<sup>104</sup> The parent when dependent on the child is entitled to recover more than nominal damages.<sup>105</sup> The amount of property left by the deceased is not a subject of inquiry,<sup>106</sup> nor the pecuniary resources of the widow or next of kin or their unfortunate condition.<sup>107</sup> Declarations of the deceased concerning efforts of his children to get his property away from him are not admissible.<sup>108</sup> The physical condition of the beneficiary cannot be shown;<sup>109</sup> nor loss of society and grief.<sup>109\*</sup>

<sup>99</sup> St. Louis, etc., R. Co. v. Mathias (Ark.), 91 S. W. Rep. 763.

<sup>100</sup> Cumberland, etc., Co. v. Anderson, 89 Miss. 732; 41 So. Rep. 263.

<sup>101</sup> Anthony, etc., Co. v. Ashby, 198 Ill. 562; 64 N. E. Rep. 1109; Stempels v. Metropolitan St. Ry. Co. 174 N. Y. 512; 66 N. E. Rep. 1117; St. Louis, etc., Ry. Co. v. Haist, 71 Ark. 258; 72 S. W. Rep. 893.

<sup>102</sup> Galveston, etc., Ry. Co. v. Puente, 30 Tex. Civ. App. 246; 70 S. W. Rep. 362.

<sup>103</sup> Chicago, etc., R. Co. v. Beaver, 199 Ill. 34; 65 N. E. Rep. 144; Corbett v. Oregon, etc., R. Co. 25 Utah, 449; 71 Pac. Rep. 1065; Draper v. Tucker, 69 Neb. 434; 95 N. W. Rep. 1026.

<sup>104</sup> Corbett v. Oregon, etc., Ry. Co. *supra*.

<sup>105</sup> Bowerman v. Lackawanna

Mining Co. 98 Mo. App. 308; 71 S. W. Rep. 1062.

<sup>106</sup> Chicago, etc., R. Co. v. Holmes, 68 Neb. 826; 94 N. W. Rep. 1007.

<sup>107</sup> Pittsburg, etc., R. Co. v. Kinmare, 203 Ill. 388; 67 N. E. Rep. 826.

<sup>108</sup> Brown v. Southern Ry. Co. 65 S. C. 260; 43 S. E. Rep. 794.

<sup>109</sup> Seattle, etc., Co. v. Hartless, 144 Fed. Rep. 379; *contra*, Evarts v. Santa Barbara, etc., R. Co. 3 Cal. App. 712; 86 Pac. Rep. 830; Emery v. Philadelphia, 208 Pa. St. 492; 57 Atl. Rep. 977; Fidelity, etc., Co. v. Buzzard, 69 Kan. 330; 76 Pa. St. 832; Texas, etc., R. Co. v. Green, 15 Tex. Ct. Rep. 133; 95 S. W. Rep. 694; Texarkana, etc., R. Co. v. Fugier, 16 Tex. Ct. Rep. 724; 95 S. W. Rep. 563.

<sup>109\*</sup> *Contra*, Evarts v. Santa Barbara, etc., R. Co. *supra*; Brick-



“What the measure of damages should be depends to a great extent upon the relationship of the survivors to the deceased and the pecuniary loss sustained by them by reason of his death. The widow and children are naturally dependent upon him to a greater extent than any other relative and entitled to support from the husband and parent. For this reason they would no doubt be entitled to a larger compensation than other relatives. Next to them the parents are more dependent upon a son than any others, as there is not only a moral, but a legal, duty on the part of a child to contribute toward the support and maintenance of his parents when they are unable to support themselves. The provisions for the benefit of relatives other than those before mentioned is not unlimited, as the act expressly provides only for such next of kin as were ‘dependent’ upon the deceased. The amount of recovery must naturally depend to a very great extent upon the contribution by the deceased to those for whose benefit the action is prosecuted by the personal representative. If the deceased contributed nothing toward the support of the next of kin and he leaves no widow, children, or parents surviving him there can be no recovery, because they sustained no pecuniary loss by reason of his death.”<sup>109a</sup> Of course, if the deceased brought suit before his death, and his administrator continues it, such damages as the injured person could have recovered if he had lived may be recovered; and in that event the administrator cannot bring another action for the benefit of the widow and children, the parents, or those dependent upon him.<sup>109b</sup>

man v. Southern R. Co. 74 S. C. 306; 54 S. E. Rep. 553; Parker v. Crowell, etc., Co. 115 La. 463; 39 So. Rep. 445; Kelley v. Ohio, etc., R. Co. 58 W. Va. 216; 52 S. E. Rep. 520.

Punitive damages cannot be allowed. The recovery is the damages “resulting” from the death.

The photograph of the deceased cannot be used to show his phy-

sical condition. *Smith v. Lehigh, etc., R. Co.* 177 N. Y. 379; 69 N. E. Rep. 729.

<sup>109a</sup> *Fithian v. St. Louis & S. F. Ry. Co.* 188 Fed. 842; *Duke v. St. Louis & S. F. R. Co.* 172 Fed. 684.

<sup>109b</sup> Nothing can be allowed the widow for mental anguish resulting from the loss of her husband. *Vreeland v. Michigan Central R. Co.* 189 Fed. 495.



§ 120. **Use of annuity tables.**—In determining the amount of damages, annuity tables may be resorted to where the action is brought by the personal representative, but not if the action be a continuation of the one brought by the deceased. These “tables may be considered by the jury in ascertaining the compensation the plaintiff is entitled to receive for the pecuniary injuries sustained by the widow and children by reason of the death of the intestate; but the jury may also consider the state of health of the intestate, his age, habits, occupation, and the likelihood of his being able to work during the period of his expectancy of life.”<sup>109c</sup>

§ 121. **Interest.**—Interest cannot be added by the jury or court upon the amount due, because the statute does not provide for it.<sup>110</sup>

§ 122. **Damages not part of the estate.**—As the amount recovered is for the benefit of the beneficiaries it forms no part of the estate,<sup>111</sup> and cannot be taken to pay its debts.<sup>112</sup> Thus, damages occasioned to his employer by the deceased cannot be set off against the amount recoverable for his death.<sup>113</sup>

§ 123. **Judgment recovered by deceased.**—A judgment recovered by the deceased during his lifetime because of his injuries is a complete bar to a suit by his administrator to recover for the beneficiaries;<sup>114</sup> but the commencement merely of an action is not.<sup>115</sup>

<sup>109c</sup> *Walsh v. New York, N. H. & H. R. Co.* 173 Fed. 494.

<sup>110</sup> *Central R. Co. v. Sears*, 66 Ga. 499; *Cook v. New York, etc., R. Co.* 10 Hun, 426.

<sup>111</sup> *Gottlieb v. North Jersey St. Ry. Co.* 72 N. J. L. 480; 63 Atl. Rep. 339; *Cleveland, etc., R. Co. v. Osgood*, 34 Ind. App. 34; 73 N. E. Rep. 285.

<sup>112</sup> *In re Williams Est.* 130 Iowa.

553; 107 N. W. Rep. 608; *Western R. Co. v. Russell*, 144 Ala. 142; 39 So. Rep. 311.

<sup>113</sup> *Western R. Co. v. Russell, supra.*

<sup>114</sup> *Hecht v. Ohio, etc., R. Co.* 132 Ind. 507; 32 N. E. Rep. 302; 54 Am. & Eng. R. Cas. 75.

<sup>115</sup> *International, etc., R. Co. v. Kuehn*, 70 Tex. 582; 8 S. W. Rep. 484.

§ 124. **Costs.**—The administrator is not liable personally for the costs of the suit,<sup>116</sup> but the estate he represents is liable, if, at least, solvent.<sup>117</sup>

§ 125. **Suit by poor person.**—An injured person may bring an action as a poor person, and may appeal any judgment against him, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, upon making a showing to the court that he is unable to pay the costs of the suit or action of a writ of error or appeal, or to give security for them, and stating “that he believes that he is entitled to the redress he seeks by such suit or action on writ of error or appeal, and setting forth briefly the nature of his alleged cause of action or appeal.”<sup>117a</sup>

§ 126. **Death of beneficiary.**—If the beneficiary die, even after suit brought, the suit abates.<sup>118</sup> And where an action is brought for the widow who is the sole beneficiary and she dies, an action cannot be thereafter prosecuted for the benefit of the deceased's parent or next of kin dependent upon him.<sup>119</sup> But if there be two or more beneficiaries standing

<sup>116</sup> *Evans v. Newland*, 34 Ind. 112; *Kinney v. Central R. Co.* 34 N. J. L. 273; see *Hicks v. Barrett*, 40 Ala. 291.

<sup>117</sup> *Chicago, etc., R. Co. v. Harshman*, 21 Ind. App. 23; 51 N. E. Rep. 343.

<sup>117a</sup> This statute is set forth at length in the Appendix A.

<sup>118</sup> *Dillier v. Cleveland, etc., R. Co.* 34 Ind. App. 52; 72 N. E. Rep. 271 (disapproving of *Jeffersonville, etc., R. Co. v. Hendricks*,

41 Ind. 48); *Woodward v. Chicago, etc., R. Co.* 23 Wis. 400; *Railroad v. Bean*, 94 Tenn. 388; 29 S. W. Rep. 370; *Railway Co. v. Lilly*, 90 Tenn. 563; 18 S. W. Rep. 243; 49 Am. & Eng. R. Cas. 495; *Chivers v. Rogers*, 50 La. Ann. 57; 23 So. Rep. 100; *Saunders v. Louisville, etc., R. Co.* 40 C. C. A. 465; 111 Fed. Rep. 708; *Hennessey v. Bavarian, etc., Co.* 145 Mo. 104; 46 S. W. Rep. 966.

<sup>119</sup> *Railroad Co. v. Bean*, *supra*.

in the first or second order exclusively, and one die, the action may be prosecuted for those living.<sup>120</sup>

§ 127. **Declarations of deceased.**—If the declarations of the deceased formed a part of the *res gestae*, they are admissible;<sup>121</sup> but if they do not form a part of the *res gestae* they are not admissible.<sup>122</sup>

§ 128. **Distribution of amount recovered.**—The federal statute makes no provision for the distribution of the amount recovered. How the amount shall be distributed is left to the laws of the state where the administrator is appointed.<sup>123</sup> The mere fact that a child was not named in the complaint as a beneficiary will not deprive him of his share.<sup>124</sup>

§ 129. **Right of widow to sue under state statute.**—Some of the state statutes give to a widow the right to sue when her husband is killed while engaged in inter-

<sup>120</sup> Senn v. Southern Ry. Co. 124 Mo. 621; 28 S. W. Rep. 66. If an administrator die, his successor does not bring the action. Hodges v. Webber, 65 N. Y. App. Div. 170; 72 N. Y. Supp. 508.

<sup>121</sup> Brownell v. Pacific R. Co. 47 Mo. 240; Fordyce v. McCouts, 51 Ark. 509; 11 S. W. Rep. 694; Little Rock, etc., R. Co. v. Leverett, 48 Ark. 333; 3 S. W. Rep. 50; Richmond, etc., Co. v. Hammond, 93 Ala. 181; 9 So. Rep. 577; Merkle v. Bennington Tp. 58 Mich. 156; 24 N. W. Rep. 776; McKeigue v. City of Janesville, 68 Wis. 50; 31 N. W. Rep. 298; Galveston v. Barbour, 62 Tex. 172; Stockmann v. Terre Haute, etc., R. Co. 15 Mo. App. 503; Entwhistle v. Feigner, 60 Mo. 214.

<sup>122</sup> Pennsylvania R. Co. v. Long, 94 Ind. 250; City of Bradford v.

Downs, 126 Pa. St. 622; 17 Atl. Rep. 884; Louisville, etc., R. Co. v. Berry, 2 Ind. App. 427; 28 N. E. Rep. 714; *contra*, Perigo v. Chicago, etc., R. Co. 55 Iowa, 326; 7 N. W. Rep. 621; Lord v. Pueblo, etc., R. Co. 12 Colo. 390; 21 Pac. Rep. 148.

<sup>123</sup> Denver etc., R. Co. v. War-ring, 37 Colo. 122; 86 Pac. Rep. 305; Hartley v. Hartley, 71 Kan. 691; 81 Pac. Rep. 505.

In 1910, on the passage of the amendment to the act, an earnest effort was made in the Senate to amend the statute in this respect.

See note 13 of this chapter.

<sup>124</sup> Oyster v. Burlington, etc., Co. 65 Neb. 719; 91 N. W. Rep. 693; 59 L. R. A. 291; Duzan v. Myers, 30 Ind. App. 227; 65 N. E. Rep. 1046.

state commerce. Can she sue? Can his administrator sue? Can they both sue? Can one sue and bar the suit of the other? These are very important questions if the act be not construed as exclusive. If it be not so construed, then two suits might be brought, one by the widow, the other by the administrator. Would the courts allow two recoveries; or would a recovery in one be a bar to the other? If the widow accepted her share of the damages received by the administrator, she would clearly estop herself to bring or maintain an action to recover damages; for she could not claim the right to recover or receive two damages. But if she has the right to bring a suit and recover damages, then the fact that the administrator brought an action and recovered damages cannot be pleaded as a bar to her action; and *vice versa*. If the act, however, is exclusive, then she has no right to bring and maintain an action; but must look to the administrator's suit for her redress.<sup>124\*</sup>

<sup>124\*</sup> The chances are that the courts will hold that in case of an interstate employee, the widow, notwithstanding the state statute, cannot maintain an action, but the action must be brought by the ad-

ministrator of the deceased. This will be upon the theory that for the death of an interstate commerce employee the Federal statute affords a complete remedy and supersedes all state legislation, See § 115.

## CHAPTER VII.

### RELEASE OF CLAIM FOR DAMAGES.

#### SECTION.

130. What contracts of release forbidden.

131. Constitutionality of Section 5 of this statute.

132. Receipt of relief money.

#### SECTION.

133. Contract for future release not binding on beneficiaries.

134. Release by beneficiary.

§ 130. **What contracts of release forbidden.**—The statute concerning releases of the railroad from liability because of injuries received by the employe is very broad. It prohibits “any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,” and declares that it shall be void. It is difficult to say just what interpretation the courts will give this statute, as it is in derogation of the right of contract but in the interest of public policy. Where a statute provided that, “All contracts made by railroads \* \* \* with their employes, or rules or regulations adopted by any corporation releasing it from liability to any employe having a right of action under the provisions” of the statute, were “declared null and void,” it was held that a contract with a voluntary relief department maintained by a railroad of which an employe was a member, to the effect that if he accepted benefits because of his injuries from such relief department he waived his right of action against the railroad company to recover damages because of such injuries, did not fall within the prohibition of the statute and was valid. The employe had his choice: if he received relief money from the voluntary relief association, he released the railroad company; and if he *brought* suit against the railroad company he released the relief department. The contract was upheld notwithstanding the



statute.<sup>1</sup> In construing a similar contract, it was said by one court: "But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby."<sup>2</sup> In still another case from the same state, it was said: "In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance,' and it is urged that no such defense has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence."<sup>3</sup> "The contract forbidden by statute is one relieving the

<sup>1</sup> *Pittsburg, etc., R. Co. v. Moore*, 152 Ind. 345; 53 N. E. Rep. 290; 44 L. R. A. 638; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E. Rep. 419; *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1; 45 N. E. Rep. 582, is overruled.

This section of the Federal statute is undoubtedly constitutional if the preceding sections are.

<sup>2</sup> *Johnson v. Philadelphia, etc., R. Co.* 163 Pa. St. 127; 29 Atl. Rep. 854.

<sup>3</sup> *Ringle v. Pennsylvania R. Co.* 164 Pa. St. 529; 30 Atl. Rep. 492; 44 Am. St. Rep. 628. To same result is *Otis v. Pennsylvania Co.* 71 Fed. Rep. 136; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Pittsburg, etc., R. Co. v. Cox*, 55 Ohio St. 497; 45 N. E. Rep. 641; 35 L. R. A. 507; *Donald v. Chi-*

*cago, etc., R. Co.* 93 Iowa, 284; 61 N. W. Rep. 971; 33 L. R. A. 492; *Fuller v. Baltimore etc., Assn.* 67 Md. 433; 10 Atl. Rep. 237; *Chicago, etc., R. Co. v. Curtis*, 51 Neb. 442; 71 N. W. Rep. 42; *Maine v. Chicago, etc., R. Co. (Iowa)*; 70 N. W. Rep. 630; *Leese v. Pennsylvania Co.* 10 Ind. App. 47; 37 N. E. Rep. 420; *Chicago, etc., R. Co. v. Miller*, 22 C. C. A. 264 (inferentially disapproving the decision below, reported in 65 Fed. Rep. 305); *State v. Baltimore, etc., R. Co.* 36 Fed. Rep. 655; *Owens v. Baltimore, etc., R. Co.* 35 Fed. Rep. 715; 1 L. R. A. 75; *Eckman v. Chicago, etc., R. Co.* 169 Ill. 312; 48 N. E. Rep. 496; 38 L. R. A. 750; *Pittsburg, etc., R. Co. v. Elwood*, 25 Ind. App. 671; 58 N. E. Rep. 866.

company from liability for the future negligence of itself and employes," said the Supreme Court of Indiana. "The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that if the employe shall prosecute a suit against the company to final judgment, he shall thereby forfeit his right to the relief fund, and, if he accepts compensation from the relief fund, he shall thereby forfeit his right of action against the company. It is nothing more or less than a contract for a choice between sources of compensation, where but a single one existed, and is the final choice—the acceptance of one against the other—that gives validity to the transaction."<sup>4</sup> If the railroad goes into the hands of a receiver, and the employe continues on in the service of the receiver, such contract remains in force

For cases on this point, see *Johnson v. Philadelphia, etc.*, R. Co. 163 Pa. St. 127; 29 Atl. Rep. 854; *Hamilton v. St. Louis, etc.*, R. Co. 118 Fed. Rep. 92; *Graft v. Baltimore, etc., Ry. Co. (Pa.)* 8 Atl. Rep. 206; *Chicago, etc., R. Co. v. Wymore (Neb.)*, 58 N. W. Rep. 1120; *Ringle v. Pennsylvania R. Co. (Pa.)* 30 Atl. Rep. 492; *Chicago, etc., R. Co. v. Bell (Neb.)*, 62 N. W. Rep. 314; *Johnson v. Railway Co.* 55 S. C. 152; 32 S. E. Rep. 2; 44 L. R. A. 645; *Beck v. Pennsylvania R. Co. (Pa.)* 43 Atl. Rep. 908; 76 Am. St. Rep. 211; *State v. Pittsburgh, etc., R. Co.* 68 Ohio St. 9; 67 N. E. Rep. 93; 64 L. R. A. 405; 68 Ohio St. 9; *Petty v. Brunswick, etc. R. Co. (Ga.)* 35 S. E. Rep. 82; *Pennsylvania R. Co. v. Chapman*, 220 Ill. 428; 77 N. E. Rep. 248; *Chicago, etc., R. Co. v. Healy*, 76 Neb. 783; 107 N. W. Rep. 1005; 10 L. R. A. (N. S.) 198; *Chicago, etc., R. Co. v. Bigley (Neb.)*, 95 N. W. Rep. 341; *Chicago, etc., R. Co. v. Olsen*, 70 Neb. 559; 97 N. W. Rep. 831;

99 N. W. Rep. 847; *Walters v. Chicago, etc., R. Co.* 74 Neb. 551; 104 N. W. Rep. 1066; *Baltimore, etc., R. Co. v. Ray*, 36 Ind. App. 430; 73 N. E. Rep. 942; *Kinney v. Baltimore, etc., Assn.* 35 W. Va. 385; 15 L. R. A. 142; 14 S. E. Rep. 8; *Fivey v. Pennsylvania R. Co. (N. J.)* 52 Atl. Rep. 472; 91 Am. St. Rep. 445; *Harrison v. Alabama, etc., R. Co. (Ala.)* 40 So. Rep. 394; *Cannaday v. A. C. L.* 143 N. C. 439; 55 S. E. Rep. 836; 8 L. R. A. (N. S.) 939; *Black v. Baltimore, etc., R. Co.* 36 Fed. Rep. 655; *Vickers v. Chicago, etc., R. Co.* 71 Fed. Rep. 139; *Hamilton v. St. Louis, etc., R. Co.* 118 Fed. Rep. 92; *Griffiths v. Earl of Dudley*, 9 Q. B. 357; *Clements v. Railroad Co.* 2 Q. B. 482; *State v. Pittsburgh, etc., R. Co.* 68 Ohio St. 9; 67 N. E. Rep. 93; 64 L. R. A. 405.

<sup>4</sup> *Pittsburg, etc., R. Co. v. Moore*, 152 Ind. 345; 53 N. E. Rep. 290; 44 L. R. A. 638; *Baltimore, etc., R. Co. v. Ray*, 36 Ind. App. 430; 73 N. E. Rep. 942.

and applies to him if he be injured while in the employ of such receiver.<sup>5</sup> But in all cases the contract to release the defendant must specifically provide that the acceptance of the relief money shall have that effect.<sup>6</sup>

§ 131. **Constitutionality of Section five of this statute.**—The Supreme Court of Connecticut has held that the section invalidating contracts releasing a railway company from liability for injuries to an employee is unconstitutional,<sup>6a</sup> on the ground that “it denies them [employees] one and all that liberty of contract which the Constitution of the United States secures to every person within their jurisdiction.” This decision has been severely criticised by several courts and in the report of the Judiciary Committee of the United States Senate.<sup>6b</sup> The power of a state legislature to enact a law of this kind has been before the United States Supreme Court and that power affirmed. A statute of the state of Iowa provided in effect that the receipt of relief insurance, benefit, or indemnity by an injured person or his heirs should constitute no bar or defense to an action for damage against a railway company under the statute declaring liability for the acts of fellow-servants in the use or operation of a railway. The company maintained a railway relief department, of which the plaintiff was a member, and under the terms of his agreement was entitled to benefits payable in accordance with the regulations, the acceptance of which was to discharge the railway company from liability for damages. He received from the relief department benefits amounting to \$822, which the railway company contended was, under his

<sup>5</sup> Baltimore, etc., R. Co. v. Ray, 36 Ind. App. 430; 73 N. E. Rep. 942. Generally, see Oyster v. Burlington, etc., Co. 65 Neb. 789; 91 N. W. Rep. 699; 59 L. R. A. 291.

<sup>6</sup> Dover v. Mississippi, etc., R. Co. 100 Mo. App. 330; 73 S. W. Rep. 298; Sturgiss v. Atlantic, etc., R. Co. 80 S. C. 167; 60 S. E. Rep. 939; 61 S. E. 261.

<sup>6a</sup> Hoxie v. New York, N. H. & H. R. Co. 82 Conn. 352; 73 Atl. 754. Mondon's case, 82 Conn. 373; 73 Atl. 762; reversed 32 Sup. Ct. 169.

<sup>6b</sup> Congressional Record, 61st Congress 2d Session, March 22, 1910, p. 2. See Appendix B.

agreement, full satisfaction of the claim for which suit was brought. Under the regulations of the relief department it was provided that membership should be voluntary, and the amount of monthly contribution was fixed according to the wages received by the member. The railway company contended that the statute was an unwarranted interference with the liberty to make contracts and a denial of the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of Iowa held the statute was valid,<sup>6c</sup> and from this decision an appeal was taken to the Supreme Court of the United States, which court affirmed the decision of the Iowa court. The following is a part of the opinion delivered by Justice Hughes:

"We pass without comment the criticisms which are made of certain details of the relief plan, for neither the suggested excellence nor the alleged defects of a particular scheme may be permitted to determine the validity of the statute, which is general in its application. The question with which we are concerned is not whether the regulations set forth in the answer are just or unjust, but whether the amended statute transcends the limits of power as defined by the Federal Constitution.

"The first ground of attack is that the statute violates the Fourteenth Amendment by reason of the restraint it lays upon liberty of contract. This section of the Code of Iowa,<sup>6d</sup> as originally enacted, imposed liability upon railroad corporations for injuries to employees, although caused by the negligence or mismanagement of fellow-servants. And it was held by this court that it was clearly within the competency of the legislature to prescribe this measure of responsibility.<sup>6e</sup> The statute in its original form also pro-

<sup>6c</sup> *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340; 92 N. W. 462.

<sup>6d</sup> Section 2071.

<sup>6e</sup> *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; 8 Sup.

Ct. 1176; 32 L. Ed. 109; affirming 31 Minn. 11; 47 Am. Rep. 771; 16 N. W. 413; *Missouri Ry. Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. 1161; 32 L. Ed. 107; affirming 33 Kan. 298; 6 Pac. 291.



vided that 'no contract which restricts such liability shall be legal or binding.'

"Subsequent to this enactment the railroad company established its relief department, and the question was raised in the state court as to the legality of the provision then incorporated in the contract of membership, by which, in case of suit for damages, the payment of benefits was to be suspended until the suit should be discontinued, and the acceptance of benefits was to operate as a full discharge. The two principal contentions against it were, first, that it was against public policy, and second, that it was in violation of the statute. Both were overruled, and with reference to the statute it was held that the contract of membership did not fall within the prohibition for the reason that it did not restrict liability, but put the employee to his election.<sup>6f</sup> The legislature then amended the section by providing expressly that a contract of this sort and the acceptance of benefits should not defeat the enforcement of the liability which the statute defined.

"Manifestly the decision that the existing statute was not broad enough to embrace the inhibition did not prevent the legislature from enlarging its scope so that it should be included. Nor was the holding of the court final upon the point of public policy, so far as the power of the legislature is concerned. The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the life of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. If the legislature had the power to incorporate a similar provision in the statute when it was passed originally, it had the same

<sup>6f</sup>Citing *Donald v. Chicago, B. & Q. R. Co.* 109 Iowa, 260; 70 & Q. R. Co. 93 Iowa, 284; 61 N. W. 630; 80 N. W. 315. N. W. 971; *Maine v. Chicago, B.*



power with regard to future transactions to enact the amendment.

It may also be observed that the statute, as amended, does not affect contracts of settlement or compromise made after the injury, and the question of the extent of the legislative power with respect to such contracts is not presented. The amendment provides, 'but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received.' As was said by the state court in construing the act: 'The legislature does not in this act forbid or place any obstacle in the way of such insurance, nor does it forbid or prevent any settlement of the matter of damages with an injured employee fairly made after the injury is received. On the contrary, the right to make such settlement is expressly provided for in the amendment to Code section 2071. The one thing which that amendment was intended to prevent was the use of this insurance or relief for which the employee has himself paid in whole or in part, as a bar to the right which the statute has given him to recover damages from the corporation.' It is urged, however, that the amendatory act prohibits the making of a contract for settlement 'by acts done after the liability had become fixed.' The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury that the subsequent acceptance of benefits shall constitute full satisfaction of the claim for damages. It is in this respect that the question arises as to the restriction of liberty of contract.

"It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution."<sup>68</sup> In *Allgeyer v. Louisiana*, *supra*, the court,

<sup>68</sup> *Allgeyer v. Louisiana*. 165 U. S. 578; 17 Sup. Ct. 427; 41 L. Ed. 832; *Lochner v. New York*, 198 U. S. 45; 25 Sup. Ct. 539; 42

in referring to the Fourteenth Amendment, said: 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.' But it was recognized in the case cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.<sup>6h</sup> 'It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally

L. Ed. 937; *Adair v. United States*, 208 U. S. 161; 28 Sup. Ct. 277; 52 L. Ed. 436.

<sup>6h</sup> *Crowley v. Christensen*, 137 U. S. 89; 11 Sup. Ct. 13; 34 L.

Ed. 620; *Jacobson v. Massachusetts*, 197 U. S. 11; 25 Sup. Ct. 358; 49 L. Ed. 643; affirming 183 Mass. 242; 67 L. R. A. 935; 66 N. E. 719.

speaking, every citizen has a right freely to contract for the price of his labor, services, or property.'<sup>61</sup>

"The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as for example the regulation of commerce with foreign nations and among the several states.

"It is subject, also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction.

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"Here there is no question as to the validity of the regulation or as to the power of the state to impose the liability which the statute prescribes. The statute relates to that phase of the relation of master and servant which is presented by the case of railroad corporations. It defined the

<sup>61</sup> *Frisbie v. United States*, 157 U. S. 165; 15 Sup. Ct. 586; 39 L. Ed. —.

liability of such corporations for injuries resulting from negligence and mismanagement in the use and operation of their railways. In the cases within its purview it extended the liability of the common law by abolishing the fellow-servant rule. Having authority to establish this regulation, it is manifest that the legislature was also entitled to insure its efficacy by prohibiting contracts in derogation of its provisions. In the exercise of this power, the legislature was not limited with respect either to the form of the contract, or the nature of the consideration, or the absolute or conditional character of the engagement. It was as competent to prohibit contracts, which on a specified event, or in a given contingency, should operate to relieve the corporation from the statutory liability which would otherwise exist as it was to deny validity to agreements of absolute waiver.

“The policy of the amendatory act was the same as that of the original statute. Its provision that contracts of insurance relief, benefit or indemnity, and the acceptance of such benefits, should not defeat recovery under the statute, was incidental to the regulation it was intended to enforce. Assuming the right of enforcement, the authority to enact this inhibition can not be denied. If the legislature had the power to prohibit contracts limiting the liability imposed, it certainly could include in the prohibition stipulations of that sort in contracts of insurance relief, benefit or indemnity, as well as in other agreements. But if the legislature could specifically provide that no contract for insurance relief should limit the liability for damages, upon what ground can it be said that it was beyond the legislative authority to deny that effect to the payment of benefits, or the acceptance of such payment, under the contract?

The asserted distinction is sought to be based upon the fact that under the contract of membership the employee has an election after the injury. But this circumstance, however, appropriate it may be for legislative consideration, cannot be regarded as defining a limitation of legislative



power. The power to prohibit contracts, in any case where it exists, necessarily implies legislative control over the transaction, despite the action of the parties. Whether this control may be exercised in a particular case depends upon the relation of the transaction to the execution of a policy which the state is competent to establish. It does not aid the argument to describe the defense as one of accord and satisfaction. The payment of benefits is the performance of the promise to pay contained in the contract of membership. If the legislature may prohibit the acceptance of the promise as a substitution for the statutory liability, it should also be able to prevent the like substitution of its performance.

“For the reasons we have stated, the considerations which properly bear upon the wisdom of the legislation need not be discussed. On the one hand it is said that the relief department is in the control of the corporation; that by reason of their exigency the employees may readily be constrained to become members; that the relief fund consists in larger part of contributions made from wages; that the acceptance of benefits takes place at a time when the employee is suffering from the consequences of his injury and, being seriously in need of aid, he may easily be induced to accept payment from the fund in which by reason of his contributions, he feels that he is entitled to share; and that such a plan, if it were permitted through the payment of benefits to result in a discharge of the liability for negligence, would operate to transfer from the corporation to its employees a burden which, in the interest of their protection and the safety of the public, the corporation should be compelled to bear. On the other hand it is urged that the relief plan is a beneficent scheme avoiding the waste of litigation, securing prompt relief in case of need due to sickness or injury, making equitable provision for deserving cases, and hence tends in an important way to promote the good of the service and the security of the employment. Even a partial statement of these various considerations shows



clearly that they are of a character to invoke the judgment of the legislature in deciding, within the limits of its power, upon the policy of the state. And, whether the policy declared by the statute in question is approved or disapproved, it cannot be said that the legislative power has been exceeded either in defining the liability or in the means taken to prevent the legislative will, with respect to it, from being thwarted.

“The second ground upon which the statute, as amended, is assailed is that it constitutes a denial of the equal protection of the laws.

“It is urged that the prohibition of the amendatory act applies only to those employees of railroad corporations who were embraced within the provision of the original statute, and to the enforcement of the particular liabilities which that statute defined. The limitation to a particular class of employees of railroad corporations is based upon the decisions of the state court that the benefits of the original statute were confined to those who were engaged in the hazardous business of operating railroads.<sup>6j</sup> It is said that all employees of the plaintiffs in error may become members of the relief department and that the limited application of the amendment, as to the effect of the acceptance of benefits under the membership contract, is an invalid discrimination.

“It was, however, entirely competent for the legislature in enacting the prohibition, for the purpose of securing the enforcement of the liability it had defined, to limit it to those cases in which the liability arose. As the purpose of the amendment was to supplement the original statute, the classification was properly the same. And with respect to subsequent transactions the amendment must be regarded as having the same validity as it would have had if it had formed a part of the earlier enactment. No criticism on the ground of discrimination can successfully be addressed to

<sup>6j</sup> Deppe v. Railroad, 36 Iowa, 52; Malone v. Railway Co. 65 Iowa, 417; 21 N. W. 756; Akeson v. Railway Co. 106 Iowa, 54; 75 N. W. 676.

the amendatory act which would not likewise impeach the statute in its earlier form.

"But the propriety of the classification of the original statute was considered and upheld by this court. And the validity of legislation abrogating the fellow-servant rule, both with respect to the class of cases embraced in the statute, and also where it is abolished as to railway employees generally, has been sustained.<sup>6k</sup> In view of the full discussion of this subject in the recent decisions above cited, nothing further need be said upon this point.

"We find none of the objections which have been made to the validity of the amendatory act to be well taken, and the judgment is, therefor."<sup>6l</sup> The constitutionality of this statute has recently been sustained by the Supreme Court of the United States.<sup>6m</sup>

<sup>6k</sup> *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210; 8 Sup. Ct. 1176; 32 L. Ed. 109; affirming 31 Minn. 11; 47 Am. Rep. 771; 16 N. W. 413; *Missouri Ry. Co. v. Mackey*, 127 U. S. 205; 8 Sup. Ct. 1161; 32 L. Ed. 107; affirming 33 Kan. 298; 6 Pac. 291; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36; 30 Sup. Ct. 376; 54 L. Ed. 921; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35; 31 Sup. Ct. 136; 55 L. Ed. 78.

<sup>6l</sup> *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549; 31 Sup. Ct. 259; 55 L. Ed. 328.

The Supreme Court of Kansas has held the statute of that state on this subject valid. *Kansas Pacific Ry. Co. v. Peavey*, 29 Kan. 169; 44 Am. Rep. 630; *Chicago, R. I. & P. Ry. Co. v. Martin*, 59 Kan. 437; 53 Pac. 461; and one of the Federal Circuit Courts of Appeals has also held it valid.

*Weir v. Rountree*, 173 Fed. 776.

That such statutes are valid, see *Chicago, etc., R. Co. v. Miller*, 76 Fed. 439; *Narramore v. Cleveland, C. C. & St. L. Ry. Co.* 96 Fed. 298; *San Antonio & A. P. Ry. Co. v. Tracey* (Tex. Civ. App.), 130 S. W. 639; *Norfolk & W. Ry. Co. v. Dixie*, 111 Va. 813; 69 S. E. 1106; *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186; 31 S. C. 164; 55 L. Ed. 167; affirming 168 Fed. 990; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209; 31 Sup. Ct. 171; 55 L. Ed. 183.

A Federal court has held the Ohio statute on this subject void. *Shaver v. Pennsylvania Co.*, 71 Fed. 931, citing *Cox v. Railroad Co.* 1 Ohio N. P. 213; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. 139. Those two cases have been sharply criticised. 31 Am. Law Rev. 460.

<sup>6m</sup> *Mondon v. New York, etc., R. Co.*, 32 Sup. Ct. 169; reversing 82 Conn. 352, 373; 73 Atl. 751, 762.

The corresponding section of the Act of 1906 is very similar to that of the present Act of 1908. The Supreme Court of the District of Columbia held this section of 1906 valid, saying: "The right to make all recoverable contracts is a property right, a right that was possessed both by the defendant and by the plaintiff.

"They entered into this contract, and under it the defendant paid the benefits and the plaintiff accepted them, and we will assume that if it were not for the statute itself the acceptance of the benefits after injury would constitute a release of the plaintiff's damages; but the Congress has undertaken to say that such a contract is against sound public policy and shall not be recognized. Are there any grounds upon which the legislature could base such an enactment? More than once in its brief the defendant shows that the entering into of this contract by the plaintiff was not only a part of his contract of employment, but was the condition of his being employed at all, and although the contract itself as elaborately set forth provides for certain preferences to be given those employees who become members of the relief benefit department, the defendant states, on page 15 of its brief, that all employees of the defendant are required to become members of the relief department as a condition of employment by that company. That is to say, every employee is required to agree upon a scale of benefits, so much for the loss of an arm, so much for the loss of an eye, so much for the loss of a life, and so on, which sums, if accepted by the employee or his representative, after the injury or death has occurred, shall constitute a bar to any action for the real damages. It is now said that no harm has been done by such a contract because the employee retained his option to accept or refuse the benefits after the injury has been received. During the oral argument the court asked the counsel for the defendant why the company exacted of its employees such an agreement in advance if it expected to rely only upon a voluntary acceptance of benefits after the injury

and not at all upon the previous contract. The reply was that a question might arise as to the condition of the employee at the time the benefits were accepted; that it might be claimed that he was not then in a condition to make an intelligent decision, and in such a case the fact that he had agreed upon such benefits at the time of his employment and when he was in full possession of all his faculties would help to sustain the act of acceptance. May this not have been one of the reasons for the action taken by Congress? If it is necessary to come back to the original contract in order to sustain the act of acceptance, then it is necessary to come back to a contract which the Congress has clearly declared to be a contract made between parties who do not stand on a level, and one party to which is presumably subject to the undue influence of the other.

“The real heart of the question is whether the circumstances and situation are such that the lawmaking body has a right to say that the contract is made between parties, one of whom has presumably an undue advantage over the other. In the case at bar the plaintiff employee was required to and did pay the sum of \$2 per month into the relief department. He alleges that he lost his arm, or a good part of it, through the negligence of the defendant. For that loss he received, according to the plea in bar, \* \* \* \$155 and an artificial arm, and this sum was due to him regardless of the question whether the company was negligent or not. On the other hand, of course, the company had agreed to contribute toward the fund and guaranteed the payment regardless of the question of its own negligence. The defendant has argued at length that these relief benefit contracts are of great advantage to the workman, but evidently Congress thought otherwise, and if this case is a fair example of the returns to be received there will probably be many others who will share that view.

“The fact should not be overlooked that although the employee has the option to reject the relief benefit contract after he is injured, if he does so he forfeits what he has



paid under it. He is not placed back where he was at the beginning when he entered into the contract of employment.

“The act, however, provides that while the amounts paid as relief benefits shall not bar the action they shall be credited to the defendant so far as they were contributed by the defendant, thus showing that Congress took note of the fact that the employee himself had contributed on his part to the relief benefit by the deductions from his wages, and intended that these shall not inure to the benefit of the defendant.

“The Congress probably took notice of the fact that when the employee accepted the benefits he got nothing that he was not legally entitled to under the contract by which he became a member of the department. No new consideration passed to him. He was only ratifying the old contract which he entered into as a part of his employment. He was only exercising the option he had bought and paid for out of his wages. The consideration of his agreement was the contract of employment. The company said to him: ‘We will not employ you at all unless you come into this department. If you do come into it you will be entitled to share its benefits.’ Now Congress says: ‘That is all right so far; but the provision in the contract that the employee, by accepting those benefits which he has bought and paid for, shall bar himself from recovering his real damages is unfair and against sound policy and shall be void. What is received under such a contract shall relieve the company only so far as it ought to be relieved.’ Can the court say there is no basis whatever for such a legislative decision? It is easy to see that it may be for the interest of the carrier to treat itself as liable in all cases of accident and injury to its employees, waiving the question of negligence, provided the amounts to be paid for such injuries are sufficiently low, and it may appear when the average is struck that the carrier has made an immense saving. If Congress thought that these relief benefits and insurance contracts tended on the whole to relieve the common carrier of a



large part of the burden which they ought to bear, and threw the burden upon the public, that may have been a good reason for the passage of the act. Before the court decides that the act has no sound rational basis it ought to look at all possible reasons that may have induced Congress to adopt it. What Congress evidently intended to do was to cut up, root and branch, this whole attempt on the part of the employer to substitute its own determination of its liability and its own adjustment of the extent of that liability as far as the same were embraced in the original contract of employment, and to substitute for it an adjustment in open court, or, at least, an adjustment by the parties independent of such original contract. There is still another consideration that may have had weight with Congress. That body has attempted to secure a greater degree of safety to railroad employees by requiring railroads to use certain safety appliances and to abstain from the use of certain other appliances, such as old-fashioned couplings which maim and kill large numbers of their workmen. If railroads can disobey such laws and turn themselves into insurance companies for the settlement of claims growing out of their violation of these laws, and fix the amounts to be paid at such rates as are shown by the plea in bar now under consideration, it may be very difficult to enforce such statutes at all.

“Liberty of contract is certainly a very valuable right, but it may not be hard to understand, in view of all these considerations, how Congress came to look upon the so-called liberty of contract between the employee and the employer as theoretical rather than real, and to conclude that an act like this would be really in favor of liberty rather than against it. This court cannot find it in its province to attempt to undo the work of the legislature in this humane act.” <sup>611</sup>

<sup>611</sup> *Potter v. Baltimore & O. R. Co.* 37 Wash. Law Rep. 466; *Goldenstein v. Baltimore & O. R. Co.* 37 Wash. Law Rep. 2; *McNa-*

§ 132. **Receipt of relief money.**—The statute gives the defendant the right to set off “any sum it has contributed or paid to any insurance, relief benefit, or indemnity, that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which said action was brought.” This is a defense and must be brought forward by plea by the defendant; such a payment cannot be shown under the general denial any more than a settlement of the liability can be. After ascertaining the amount the plaintiff would otherwise be entitled to recover, the jury deducts therefrom the amount the injured person has received and returns a verdict for the balance. The court cannot make the deduction. The defendant may set off any sum it has contributed or paid to any insurance, or relief benefit it has paid, and it may also set off the amount of any “indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death.” It is the amount paid by the defendant that may be set off and also the amount the plaintiff has received for his injuries from any other source that may be set off. If the amount paid by the defendant has been deducted from his wages as they accrued, then the payment is not that of the defendant, but that of the plaintiff.<sup>7</sup> But the insurance or relief benefit must have been in force at the time of his injury, and he must have received pecuniary benefit therefrom; the defendant must have paid money for the insurance or benefit. Of course, money paid for the insurance

*mara v. Washington Terminal Co.*  
35 App. D. C. 230; 38 Wash. Law  
Rep. 343.

In quite a recent case the United States Supreme Court has held that an existing valid contract may be rendered invalid by an act of Congress within its power to enact under the interstate commerce clause, and this would seem to settle the validity

of the section of this Act of 1908 now under discussion. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467; 31 Sup. Ct. 265; 55 L. Ed. 297.

In *Zikos v. Oregon R. & N. Co.* 179 Fed. 893, it is said that this section can be eliminated and the statute still stand.

<sup>7</sup> It is usually an enforced payment.

or benefit by another common carrier cannot be deducted. Money received as an "indemnity" does not come from an outside source but has a connection with the defendant.<sup>8</sup>

**§ 133. Contract for future release not binding on beneficiaries.**—Irrespective of whether or not the employe is bound by his contract of release for future damages, the beneficiaries are not bound thereby, because they are not parties to the contract. Such a contract is not for their benefit.<sup>9</sup> This was held true where the deceased was a member of a relief association, and had agreed that the acceptance of the relief money should release his employer.<sup>10</sup> But the proviso to Section five evidently applies where the beneficiaries bring action for the death of the employe; and they will be bound by its provisions the same as the employee, except that if he be a member of a relief association and has not elected to accept the amount due therefrom, whereby his employer would be released, they would not be bound by any of its provisions, unless they elected to accept payment in accordance with the provisions of the contract.

**§ 134. Release by beneficiary.**—A release by the injured person in his lifetime and after his injuries of the defendant from its liabilities to him, or a settlement or the procuring of a judgment by him, is a complete bar to an action by his administrator.<sup>11</sup> So a settlement or compromise by the ad-

<sup>8</sup>It is clear that the word "indemnity" does not cover the case of ordinary life or accident insurance.

<sup>9</sup>*Adams v. Northern Pac. R. Co.* 95 Fed. 938; *Illinois, etc., R. Co. v. Cozby*, 69 Ill. App. 256; *Maney v. Chicago, etc., R. Co.* 49 Ill. App. 105; *Strode v. St. Louis Transit Co. (Mo.)* 87 S. W. Rep. 976.

<sup>10</sup>*Cowen v. Ray*, 47 C. C. A. 452; 108 Fed. Rep. 320; *Chicago, etc., R. Co. v. Wymore*, 40 Neb. 645; 58 N. W. Rep. 1120; *Mc-*

*Kering v. Pennsylvania R. Co.* 65 N. J. L. 57; 46 Atl. Rep. 715.

<sup>11</sup>*Hecht v. Ohio, etc., R. Co.* 132 Ind. 507; 32 N. E. Rep. 302; *Littlewood v. Mayor, etc.*, 89 N. Y. 24, affirming 15 J. & S. 547; *Ried v. Great Eastern Ry. Co. L. R.* 3, Q. R. 555; 37 L. J. Q. B. 278; 18 L. T. (N. S.) 822; 16 W. R. 1040; *Dibble v. New York, etc., R. Co.* 25 Barb. 183; *Southern, etc., Co. v. Cassin*, 111 Ga. 575; 36 S. E. Rep. 881; *Hill v. Pennsylvania R. Co.* 178 Pa.

ministrator is a bar to the action,<sup>12</sup> but not without an order of court.<sup>13</sup> But neither the widow nor next of kin of the deceased can release the claim of the administrator.<sup>14</sup> Yet a beneficiary may release so much of the amount as he or she would be entitled to.<sup>15</sup> And if there be but one beneficiary, he or she (and so all of them) may compromise the claim in full.<sup>16</sup>

St. 223; 35 Atl. Rep. 997; 35 L. R. A. 196; 39 W. N. Cas. 221; Price v. Railroad Co. 33 S. C. 556; 12 S. E. Rep. 413; Brown v. Chattanooga Elec. R. Co. 101 Tenn. 252; 47 S. W. Rep. 415. But not if secured by unfair means. Price v. Richmond, etc., R. Co. 38 S. C. 199; 17 S. E. Rep. 732; Missouri, etc., Co. v. Brantley, 26 Tex. Civ. App. 11; 62 S. W. Rep. 94; Thompson v. Ft. Worth, etc., R. Co. 97 Tex. 590; 80 S. W. Rep. 990; Blount v. Gulf, etc., R. Co. (Tex. Civ. App.) 82 S. W. Rep. 305.

The bringing of a suit by the deceased, undetermined at his death, is no bar to the administrator's suit. International, etc., R. Co. v. Kuehn, 70 Tex. 582; 8 S. W. Rep. 484; Indianapolis, etc., R. Co. v. Stout, 53 Ind. 143.

Evidence of the payment of the expenses of the deceased's sickness and of his funeral expenses is not admissible in evidence. Murray v. Usher, 117 N. Y. 542; 23 N. E. Rep. 564; 46 Minn. 404.

<sup>12</sup> Henchey v. City of Chicago, 41 Ill. 136; Hartigan v. Southern Pac. R. Co. 86 Cal. 142; 24 Pac. Rep. 851; Foot v. Great Northern R. Co. 81 Minn. 493; 84 N. W. Rep. 342; 52 L. R. A. 354; Baltimore, etc., R. Co. v. Holtman, 25 Ohio C. C. 140.

<sup>13</sup> Pittsburgh, etc., R. Co. v. Gipe, 160 Ind. 360; 65 N. E. Rep. 1034.

Order is not necessary. Foot v. Great Northern R. Co. *supra*. A fraudulent release held void. Pisane v. Shanley, 66 N. J. L. 1; 48 Atl. Rep. 618. Before apportionment, is valid. Sluber v. McEntee, 142 N. Y. 200; 47 N. Y. App. Div. 471; 63 N. Y. Supp. 580; affirmed, 164 N. Y. 58; 58 N. E. Rep. 4.

<sup>14</sup> Yelton v. Evansville, etc., R. Co. 134 Ind. 414; 33 N. E. Rep. 629; Cleveland, etc., Ry. Co. v. Osgood, 36 Ind. App. 34; 73 N. E. Rep. 285; Dowell v. Burlington, etc., Ry. Co. 62 Iowa, 629; Pittsburg, etc., R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 638; South, etc., R. Co. v. Sullivan, 59 Ala. 272; Knoxville, etc., R. Co. v. Acuff, 92 Tenn. 26; 20 S. W. Rep. 348; Pittsburg, etc., R. Co. v. Hosea, 152 Ind. 412; 53 N. E. Rep. 419; Oyster v. Burlington, etc., R. Co. 65 Neb. 789; 91 N. W. Rep. 699; 59 L. R. A. 291.

<sup>15</sup> Chicago, etc., Ry. Co. v. Wy-  
more, 40 Neb. 645; 58 N. W. Rep. 1120.

<sup>16</sup> Prater v. Tennessee, etc., Co. 105 Tenn. 496; 58 S. W. Rep. 1068; Small v. Kreech (Tenn.) 46 S. W. Rep. 1019; Stephens v. Nashville, etc., R. Co. 10 Lea, 448; Schmidt v. Deegan, 69 Wis. 300; 34 N. W. Rep. 83; Southern Pac. Co. v. Tomlinson, 163 U. S. 369; 16 Sup. Ct. Rep. 1171.

## CHAPTER VIII.

### IN WHAT COURTS SUIT MAY BE BROUGHT.

#### SECTION

- 135. Plaintiff may bring suit in Federal court.
- 136. Jurisdiction of state courts.
- 137. Congress conferring jurisdiction on a state court.
- 138. Removal of case to Federal court.
- 139. Where actions must be brought.

#### SECTION

- 140. Pleading.
- 141. Common carriers defined.
- 142. Statute of limitations.
- 143. Review on error.
- 144. Statute not retroactive.
- 145. State statutes requiring notice of injury to be given before bringing action.

§ 135. Plaintiff may bring suit in a federal court.—Section six as amended in 1910 provides that “under this Act an action may be brought in a Circuit Court of the United States,<sup>1</sup> in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.”<sup>2</sup> It will be noted that this statute says nothing about the amount involved. The action is a special one on the statute—a new cause of action, so far as the United States law is concerned, one that could not prior to this Act be enforced under a

<sup>1</sup> The Judicial Code of the United States, approved March 3, 1911, abolished the circuit courts, and the powers and duties heretofore exercised and performed were transferred and imposed upon the United States district courts, and by Section 24 of Article 8, the district courts have jurisdiction

“of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings of which exclusive jurisdiction has been conferred upon the commerce court.”

<sup>2</sup> See Appendix A for this amendment.



United States statute—and Congress having declared that under the act “an action may be brought in a Circuit Court of the United States” intended and did by this declaration give jurisdiction to that court to bring an action “under this statute” regardless of the amount involved.<sup>3</sup>

§ 136. **Jurisdiction of state courts.**—In an action brought under this statute the Supreme Court of Connecticut had held that the courts of that state had no jurisdiction of a cause of action brought upon this Act.<sup>4</sup> But before the decision of the Connecticut Supreme Court a number of actions had been brought upon this Act in state courts, in some of which no question of jurisdiction was raised,<sup>5</sup> and in others it was, and decided that a state court had jurisdiction.<sup>6</sup> This question came up in one of the circuit courts,

<sup>3</sup> To the author this seems to be a reasonable interpretation of this section; but so far as he knows the question has not been decided. But it may be reasoned that by the attempt to confer jurisdiction on state courts, Congress intended only to limit the right of action in the Federal courts to instances where two thousand dollars or more are involved, and to provide a forum where cases below that amount could be tried. This amendment was made because of the decision of the Supreme Court of Connecticut in *Hoxie v. New York*, N. H. & H. R. R. Co. 82 Conn. 352; 73 Atl. 754, holding that state courts had no jurisdiction of an action brought upon this statute, and, therefore, if that be true, an employee whose damages did not amount to two thousand dollars was without remedy. But it seems to the author that it was the intent of Congress to give the Federal courts jurisdiction of all actions brought under this statute,

regardless of the amount involved.

Whether or not this act, by implication, repeals the statutory shipowners to limit their liability in so far as they might be used by a railroad company engaged in interstate commerce to limit its liability for injuries to employees on its vessels used in such commerce, it does not deprive a court of admiralty of the general jurisdiction over limitations of liability because such a claim is involved, nor of jurisdiction to hear and determine a claim on its merits therein with the consent of the claimant. *The Passaic*, 190 Fed. 644.

<sup>4</sup> *Hoxie v. New York*, N. H. & H. R. R. Co. 82 Conn. 352; 73 Atl. 754; reversed 32 Sup. Ct. 169.

<sup>5</sup> *Central of Georgia R. Co. v. Sims*, 163 Ala. 669; 53 So. 826.

<sup>6</sup> *Bradbury v. Chicago*, R. I. & P. Ry. Co. 149 Iowa, 51; 128 N. W. 1; *St. Louis*, I. M. & S. Ry. Co. v. *Hesterly*, (Ark.); 135 S. W. 874.

in a case removed to it from a state court, and the court held that a state court could entertain an action based wholly on this statute.<sup>6a</sup> "State courts," said Judge Whitson, "enforce rights arising under the laws of the different states, applying the rule of *lex loci contractus*. They uphold rights arising in foreign nations which depend upon the constitution of foreign laws. Let it be admitted that this is through comity only, yet it would appear even then that the analogy ought to follow. But this is a stronger reason growing out of the more intimate relation of the states to the general government. The Constitution of the United States being the supreme law of the land, state and Federal courts are alike subject to its provisions, and the refusal of the former to enforce rights conferred by Congress, would put them in the same category as would a refusal to entertain causes flowing from any other recognized source of authority. It would be an anomaly in our system of state tribunals, after having so long entertained the grievances of litigants, where rights are traceable to Congressional legislation, should refuse to further do so because of the fact that there has been provided, by a power clearly competent, different rules of liability for those engaged in interstate commerce from those which may be fixed by statutes or recognized by decisions in the several states. All government rests upon acquiescence in the established order. Where common consent is withdrawn, prescribed rules of conduct are overthrown and anarchy reigns; and it is not to be supposed that state courts will or can refuse to abide by the result when the Supreme Court, the final arbiter, has decided that they have jurisdiction. If this should occur, the Constitution would cease to be the supreme law of the land, and its express provision that 'the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the

<sup>6a</sup> *Zikos v. Oregon R. & N. Co.* 179 Fed. 893.

contrary notwithstanding,' would become null and its application inoperative." <sup>6b</sup>

"The general question," said Justice Bradley, "whether state courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises sometimes with a leaning in one direction and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provisions or by incompatibility in the exercise arising from the nature of the particular case. When we consider the structure and true relations of the Federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction. The laws of the United States are laws of the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the states; concurrent as to place and person, though distinct as to subject-matter. Legal or

<sup>6b</sup> "So, the holding in *Hoxie v. New York, N. H. & H. R. R. Co.* 823 Conn. 732; 73 Atl. 754, that it was not intended by Congress that the rights granted should be enforceable in the state courts, cannot be followed for the reasons already assigned and for the additional reason that jurisdiction of the state courts is attributable to the powers conferred upon them by the states. To defeat the exercise of this power there must be an express prohibition by Congress." *Zikos v. Oregon R. & N. Co.* 179 Fed. 893.

"The legislature of a state cannot abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control; but the courts of the state, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases under the Constitution and laws of the United States." *Murray v. Chicago & N. W. Ry. Co.* 62 Fed. 24.

equitable rights acquired under either system of law, may be enforced in any court of either sovereignty, competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under the state laws may be prosecuted in the state courts, and also, if parties reside in different states, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that, where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize the two as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, so as to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."<sup>6c</sup> The reasoning of this position is greatly supported by the many cases that have been brought in state courts to re-

<sup>6c</sup> *Cladlin v. Houseman*, 93 U. S. 130; 23 L. Ed. 83, quoted with approval in *Bradbury v. Chicago & N. W. Ry. Co.* 149 Iowa, 51; 128 N. W. 1.

On this point, see, also, *Raisler*

*v. Oliver*, 97 Ala. 719; 12 So. 238; 38 Am. St. 215; *Wilcox v. Luce*, 118 Cal. 642; 45 Pac. 676; 50 Pac. 758; 62 Am. St. 306; 45 L. R. A. 582; *Schuyler National Bank v. Bollong*, 24 Neb. 827; 40



cover damages occasioned by a failure to equip cars with automatic couplers as Congress had required of railway companies engaged in interstate commerce, even though provisions of the statute providing that an employee of such a company did not assume the risk of coupling cars not equipped as the statute required.<sup>6d</sup>

### § 137. Congress conferring jurisdiction on a state court.

—The amendment of 1910 to Section six expressly declares that “The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states.” The wording of this amendment,

N. W. 417; *Bletz v. Columbia Nat. Bank*, 87 Pa. 92; 30 Am. Rep. 345; *Brinkerhoff v. Bostwick*, 88 N. Y. 60; *People v. Welch*, 141 N. Y. 273; 36 N. E. 328; 24 L. R. A. 117; 38 Am. St. 793.

<sup>6d</sup> See *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; *Schlemmer v. Buffalo, etc., Ry. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *Schlemmer v. Buffalo, etc., R. Co.* 220 U. S. 590; 31 Sup. Ct. 561; 55 L. Ed. 596; affirming 222 Pa. 470; 71 Atl. 1053. A number of cases have been brought upon the Safety Appliance Act in state courts. *Missouri Pac. Ry. Co. v. Brinkmeier*, 77 Kan. 14; 93 Pac. Rep. 621; *Southern Pac. R. Co. v. Allen* (Tex. Civ. App.), 106 S. W. Rep. 441; *Chicago, etc., Ry. Co. v. State* (Ark.), 111 S. W. Rep. 456; *Cleveland, etc., Ry. Co. v. Curtis*, 134 Ill. App. 565; *Nichols v. Chesapeake, etc., Ry. Co.* 32 Ky. L. Rep. 270; 105 S. W. 481; 32 Ky. L. Rep. 270; *Mobile, etc. R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *Kansas City, etc., R. Co. v. Flippo*, 138

Ala. 487; 35 So. Rep. 457; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307; 9 So. Rep. 253; 25 Am. St. Rep. 47.

That state courts have jurisdiction is settled. *Mondon v. N. Y., etc., R. Co.*, 32 U. S. Sup. Ct. 169.

Mr. Borah: “If the state court has jurisdiction in the matter, it could enforce the Federal law just the same as if it were a Federal court.” 60 Cong. Rec., 1st Sess., p. 4537.

Mr. Dolliver: “But I do not hesitate to say that I understand that a citizen of Georgia can bring a suit in the state court of Georgia for the enforcement of his rights under this act, and would remain in the state court of Georgia unless the defendant exercised his right under the judiciary act and transferred the controversy to the Federal court.” 60 Cong. Rec., 1st Sess., p. 4548.

Senate Report, No. 432 in the 61st Congress, 2d Session, March 22, 1910, contains an argument, backed by the citation of many cases and quotations therefrom, showing that the state courts have jurisdiction of cases brought under this statute. Appendix B.



it would seem, proceeds upon the assumption that state courts had jurisdiction of actions brought under the Act and Federal courts did not (at least if the amount involved did not amount to two thousand dollars), and thereby it was sought to confer jurisdiction upon the Federal courts. But such is not the true interpretation of the statute, in the light of the debates in Congress. This amendment was made to confer jurisdiction upon state courts, because of the decision of the Supreme Court of Connecticut,<sup>6e</sup> which was severely criticised and declared to be erroneous. The question is a very pertinent one, if a state court had no jurisdiction of an action brought under this statute can Congress confer it? This question has not been specifically answered although it has been discussed.<sup>6f</sup> If we turn to a case of a state court granting a foreigner naturalization papers under the Federal statutes, we have an analogous instance of a state court acting under a Federal statute. It has been expressly held that Congress can confer power upon state courts to hear and grant an application for naturalization papers, without an act of the state legislature authorizing it to assume jurisdiction under the Federal statute. By the Federal statute<sup>6g</sup> "a court of record of any of the states having common-law jurisdiction and a seal, and a clerk" is expressly authorized by Congress to naturalize qualified aliens, and to issue to them certificates of citizenship. The Constitution of the United States provides that Congress shall have power "to establish a uniform rule of naturalization \* \* \* to make all laws which shall be necessary and proper for carrying into execution the foregoing power, and all other powers vested by this Constitution in the government of the United States or in any department or offices thereof," and that "this Constitution and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land, and

<sup>6e</sup> *Hoxie v. New York, N. H. & H. R. R. Co.* 82 Conn. 352; 73 Atl. 754. *Mondon v. N. G. A. H. & H. R. Co.*, 82 Conn. 373;

73 Atl. 762.

<sup>6f</sup> *Zikos v. Oregon R. & N. Co.* 179 Fed. 893.

<sup>6g</sup> R. S. Sec. 2165.

the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.”<sup>6h</sup> It is an axiomatic construction of the powers conferred by the Federal Constitution that the grant of power to do an act or to obtain an end is an implied grant of plenary authority to select and use the appropriate means to accomplish the purpose contemplated. It should be observed that the Constitution of the United States having granted Congress power over interstate commerce, such power (and such are the effect of the decisions), draws to Congress authority to select and use all appropriate means to enforce its provisions. In a case where the power of a state court to naturalize a foreigner was involved it was claimed that this act of a state court in hearing an application for and granting a naturalization certificate was void on two grounds: First, because Congress had no power under the Constitution to grant this power to a state court; and, second, because if it had the power, a court of common-law jurisdiction had no authority to accept or to exercise this power in the absence of state legislative permission so to do from the state which established it. In one case the court considered that as the statute on naturalization had been in force since 1790, had been universally acted upon by the courts and executive officers since that date without question of its validity, it was now too late to raise the question of its constitutionality. “Nor are the conclusions which contemporaneous construction, time, and practice have adopted without cogent reasons to support them,” said the court. “While it is true that Mr. Justice Story, speaking for the Supreme Court, declared in 1816<sup>6i</sup> that the Congress had not vested any portion of the judicial power of the nation in courts which it did not itself ordain and establish, and this statement has since been repeated; the fact is that he was then thinking and

<sup>6h</sup> Art. 1, Sec. 8, and Art. 6.

1 Wheat. 304, 328-333; 4 L.

<sup>6i</sup> In *Martin v. Hunter's Lessee*,

Ed. 97.

speaking of the judicial power granted by Section one<sup>6j</sup> and defined by Section two<sup>6k</sup> of Article 2 of the Constitution. The better opinion now is that the judicial power granted by the former action, which may be vested in the national courts only, is defined in the latter section; that it necessarily extends only to the trial of 'all cases in law and equity arising under this Constitution,' and to the trial of the other nine classes of cases named in Section two, and specified by Chief Justice Jay in his opinion in *Chisholm v. Georgia*;<sup>6l</sup> and that these sections neither expressly nor impliedly prohibit Congress from conferring judicial power upon other courts, or upon executive or other officers, in other cases where, in its opinion, the devolution of such power is either necessary or convenient in the execution of the authority granted to the legislative or to the executive department of the government through the Constitution. Through the authority granted to the territorial courts to have and determine controversies arising in the territory of the United States is judicial power. But it is not a part of the judicial power granted by Section one, and defined by section two, of article three of the Constitution. Nevertheless, under the constitutional grant to Congress of power to 'make all needful rules and regulations respecting the

<sup>6j</sup> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time ordain and establish."

<sup>6k</sup> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United

States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects."

<sup>6l</sup> 2 Dall. 419, 475; 1 L. Ed. 440. The court also cited *Ex parte Gist*, 26 Ala. 156, 162; *Claffin v. Houseman*, 93 U. S. 130, 139; 23 L. Ed. 833; and *Robertson v. Baldwin*, 165 U. S. 275, 279; 17 Sup. Ct. 326; 41 L. Ed. 715.

territory \* \* \* belonging to the United States,'<sup>6m</sup> the body may create territorial courts not contemplated nor authorized by article three of the Constitution, and may confer upon such courts and the bestowal of such authority constitutes appropriate means by which to exercise the Congressional power to make needful rules respecting the territory belonging to the United States.<sup>6n</sup> Of the same nature is the judicial power conferred upon the Secretary of the Interior, the Commissioner of the General Land Office, and his subordinate officers, to hear and determine claims to the public lands of the nation;<sup>6o</sup> that bestowed on justices of the peace and other magistrates of the state by Act September 24, 1789,<sup>6p</sup> to arrest and commit to jail persons charged with a violation of the criminal laws of the United States;<sup>6q</sup> that conferred upon the state courts to hear and determine suits by or against corporations and officers created by the nation;<sup>6r</sup> that gives to magistrates of any county, city or town corporate, to hear, determine, and certify the claims of owners of fugitive slaves;<sup>6s</sup> that bestowed upon justices of the peace to arrest, commit to jail, and deliver to the masters deserting seamen;<sup>6t</sup> that conferred upon the courts of the state by the various acts of Congress which empower them to naturalize aliens;<sup>6u</sup> and that

<sup>6m</sup> Article 4, Sec. 3.

<sup>6n</sup> Citing *American Ins. Co. v. Canter*, 1 Pet. 511, 544; 7 L. Ed. 242; *Clinton v. Englebrecht*, 13 Wall. 434, 447; 20 L. Ed. 659; *McAllister v. United States*, 141 U. S. 174, 184; 11 Sup. Ct. 949; 35 L. Ed. 693.

<sup>6o</sup> Citing *United States v. Winona & St. P. R. Co.* 67 Fed. 948, 957; 15 C. C. A. 96, 104.

<sup>6p</sup> 1 U. S. Stat. at L., Chap. 20, Sec. 33.

<sup>6q</sup> Ex parte Gist, 26 Ala. 156, 164.

<sup>6r</sup> *Bank of the United States v. Deveaux*, 5 Cranch, 61; 3 L. Ed.

38 *Claffin v. Houseman*, 93 U. S. 135; 23 L. Ed. 833.

<sup>6s</sup> Under Act February 12, 1793, Chap. 7, 1 U. S. Stat. at L., 302, Sec. 3: *Prigg v. Pennsylvania*, 16 Pet. 536, 615, 620, 621; 10 L. Ed. 1060.

<sup>6t</sup> Under Act July 20, 1790, Chap. 29; 1 U. S. Stat. at L., 131, 134; *Robertson v. Baldwin*, 165 U. S. 275, 277, 280; 17 Sup. Ct. 326; 41 L. Ed. 715.

<sup>6u</sup> 1 Stat. 103, 414; 2 Stat. 153, 155; Rev. Stat., Sec. 2165; *Robertson v. Baldwin*, 165 U. S. 275; 17 Sup. Ct. 326; 41 L. Ed. 715; *Claffin v. Houseman*, 93 U. S. 130,



granted by acts of Congress to executive officers of the United States and to courts and magistrates of the states in numerous other instances, not to try and determine the cases specified in section two of article three of the Constitution, but to perform the judicial function of hearing and determining other questions and issues which a proper exercise of the powers granted to the various departments of the government require to be thus decided. The grant by the Congress of the United States of the judicial power to admit aliens to citizenship, and to hear and decide the various questions which do not arise in the cases specified in article three of the Constitution, but which a proper exercise of the powers granted by that instrument to the executive or to the legislative department of the government requires to be judicially decided, was neither expressly nor impliedly prohibited by that article. The Congressional power to make such a grant, and to vest judicial authority in state courts and officers, in such case, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it." The court then proceeds to discuss the question whether it is necessary for a state legislature to authorize a state court to proceed under the Federal statute where Congress has extended to it authority to act, and reaches the conclusion that it is not.<sup>6v</sup> "When the United States," said the court, "offered admission to the Union to the people of Missouri [where the case arose], it made this offer subject to the potent condition that the Constitution of the United States and the laws that had been made and should be made by Congress in accordance with its provisions, should become the supreme law

140; 23 L. Ed. 83; In re Connor, 39 Cal. 98, 101; 2 Am. Rep. 427.

<sup>6v</sup> "The suggestion is noted that the legislature of a state might prohibit its courts from exercising the power of naturalization, and

that this prohibition would be fatal to the devolution of the congressional authority." But no such inhibition having been imposed, the court refused to discuss it.



of the new state, binding alike upon all its inhabitants, whether laymen or lawyers, citizens or judges. The people of Missouri accepted the offer and its condition, and became a part of the nation. Thereupon the Constitution of the United States, and the laws enacted in accordance with, which then conferred upon the courts of the states the judicial power to admit aliens to citizenship, became a part of the supreme law of the new state of Missouri, which the people of that state, by their acceptance of the offer of admission, had contracted should be obeyed and executed by the citizens, the judges, and the courts of this state. The acceptance by the people of Missouri of this offer of admission, in view of the power which had been granted by the Congress to certain courts of the states to admit aliens to citizenship, and in view of the practice of those courts to exercise this jurisdiction, which had prevailed for nearly three decades, gave to the courts of Missouri plenary jurisdiction to exercise any power to admit aliens to citizenship which the Congress had then conferred or might thereafter bestow upon them under the provisions of the Constitution applicable to that subject.<sup>6w</sup> The resistless conclusion is that the Congress of the United States was by section eight, article one, of the Constitution, granted the necessary authority to vest in the courts of the states having common law jurisdiction the judicial power to admit qualified aliens to citizenship; that, in the absence of legislative authority or permission from the states which created them, such courts may lawfully exercise this power, and that Section 2165 of the Revised Statutes is neither unconstitutional nor invalid.”<sup>6x</sup>

<sup>6w</sup> *Claffin v. Houseman*, 93 U. S. 130, 136-142; 23 L. Ed. 833; *Ex parte Gist*, 26 Ala. 156, 164; *Prigg v. Pennsylvania*, 16 Pet. 536, 620; 10 L. Ed. 1060; *Robertson v. Baldwin*, 165 U. S. 275, 280; 17 Sup. Ct. 326; 41 L. Ed. 715.

<sup>6x</sup> *Levin v. United States*, 128 Fed. 826; 63 C. C. A. 476. For an action on this statute in a state court, see *Horton v. Seaboard Air Line Ry. Co.* (N. C.) 72 S. E. 958. This question is now settled. *Mondon v. N. Y., etc., R. Co.*, 39 Sup. Ct. 169.

§ 138. **Removal of case to Federal Court.**—Before the amendment of 1910, cases brought in a state court could be removed to a Federal court, if there was diverse citizenship<sup>6y</sup> or there was involved a construction of the statute. But now by the provisions of the statute as amended in 1910, a case arising under this Act and brought in any state court of competent jurisdiction can only be removed to a court of the United States, where a diverse citizenship exists between the plaintiff and defendant. In such an instance it can be removed.<sup>6z</sup>

§ 139. **Where actions must be brought.**—The statute expressly declares, as amended in 1910, where the action must be brought, viz.: "In a Circuit [now District] Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." When the action is brought in a Federal court the plaintiff has his option of three places where he may bring it, viz.: (1) in the district of the residence of the defendant; (2) or in which the cause of action arose; (3) or in which the defendant shall be doing business at the time of commencing the action. So far there is no difficulty. But where shall the action be brought if brought in a state court? Here resort must be had to the state statutes in order to answer that question. Congress has not undertaken to answer it. The law applicable in this respect to a cause of action is the same as that applicable to any other cause of action brought against the same defendant. If sued in a Federal court outside of the district designated above, the defendant may object, and file a plea in abatement.<sup>6z</sup>

<sup>6y</sup> *Miller v. Illinois Central R. Co.* 168 Fed. 982; *Clark v. Southern Pacific Ry. Co.* 175 Fed. 122.

<sup>6z</sup> *Van Brimmer v. Texas & P. Ry. Co.* 190 Fed. 394.

<sup>6zz</sup> *Bottoms v. St. Louis & S. F. Ry. Co.* 179 Fed. 318; *Conrad v. Atchison, T. & S. F. Ry. Co.* 173 Fed. 527; *Smith v. Detroit & T. S. L. R. Co.* 175 Fed. 506.

§ 140. **Pleading.**—It is not necessary to plead the act in order to show that the action is based upon it; nor is any reference to the provisions of the act necessary. It is sufficient if the complaint show that the defendant and the employe were both engaged in interstate commerce at the time he received his injury; and when that is done the court will measure the plaintiff's right to recover and the defendant's liability for damages by the terms of the statute. It has been suggested that if the declaration or complaint does not disclose whether the action is based upon the statute or not—or whether it is grounded upon the statute or the general law of negligence—it is demurrable on the ground that no cause of action is stated. But this position is untenable. The question of the jurisdiction of a Federal Court is always present throughout the entire proceedings, except where there has been a waiver over the person. It may be presented at any time. While its jurisdiction is general in one sense of the word, in another it is limited. The true rule is that if the declaration or complaint does not disclose the action is based or grounded upon the statute, then the plaintiff is not seeking to recover for an injury received while engaged in the interstate traffic of the defendant and the sufficiency of his pleading must be measured by the general state law, the provisions of the statute not being involved. However, if the evidence discloses the case is one under the statute there will be a fatal variance and the plaintiff must fail.<sup>7</sup>

<sup>7</sup> This section was approved in *Missouri, K. & T. Ry. Co. v. Hawley* (Tex. Civ. App.) 123 S. W. 726.

Where the petition alleges a cause of action under this statute it will be so construed, though it does not mention the act or state that the action is intended to be brought thereunder. *Smith v. Detroit & T., S. L. R. Co.* 175 Fed. 506; *Cound v. Atchison, T. & S. F.*

*Ry. Co.* 173 Fed. 527. It should show that the plaintiff and defendant were engaged in interstate commerce at the time of the injury. The precise nature of the defect causing the injury need not be shown. *Norfolk & W. R. Co. v. Hazelrigg*, 184 Fed. 828; 107 C. C. A. 66.

In one case in Texas it has been held that whether the defendant was engaged in interstate com-

§ 141. **Common carriers defined—Receivers.**—The statute applies to "every common carrier by railroad while engaging in" interstate commerce and in the territories. The statute also provides that: "The term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."<sup>8</sup>

§ 142. **Statute of limitations.**—"No action shall be maintained under this act unless it commenced within two years from the day the cause of action accrued."<sup>9</sup> At what time "the cause of action accrued" is the turning-point under this section. So far as the employee is personally concerned, there is no difficulty; for his cause of action accrues on the day he is injured. The difficult question is when he dies from his injuries,—when does the right of action in the administrator accrue? Clearly, at least, at the death of the employee. But did not it accrue before that time,—at the date of the injury? The weight of authority is that the administrator's right of action is a new and independent cause of action, and therefore, his cause of action did not accrue until the death of the injured employee.

§ 143. **Review on error.**—If the action be brought in the United States District Court, any judgment rendered therein may be reviewed in the Circuit Court of Appeals on a writ of error as in ordinary cases; and from the Court of Appeals the case may be taken on a writ of error to the Supreme Court of the United States. If the constitu-

merce or intrastate commerce at the time of the injury being peculiarly within its knowledge, the plaintiff is not required to allege such fact with that certainty required as to facts within his own knowledge. *Missouri, K. & T. Ry. Co. v. Hawley* (Tex. Civ. App.);

123 S. W. 726. In this case facts were so alleged as to show the action was by an intrastate employee against an interstate railway company.

<sup>8</sup>Section 7 of the Act.

<sup>9</sup>Section 6 of Act.



tionality of the statute be involved, then a writ of error direct from the Federal Supreme Court to the United States Circuit Court of the district which rendered the judgment lies, no matter how decided, or where a state law upon the subject is claimed to be in contravention of the Federal Constitution or the Federal Act in question, or where the jurisdiction of the Federal Court is drawn in question. If the action is prosecuted in a state court then the judgment may be reviewed by the Supreme Court on a writ of error issued by it to the court of last resort in the state in the following instances: (1.) Where each court of last resort holds the Act invalid. (2.) Where such court holds a state statute valid which the plaintiff has relied upon, but which the defendant has attacked on the ground that it contravenes the Federal constitution. (3.) Where the judgment of such court is adverse to a right, privilege or immunity specially set up and claimed by either plaintiff or defendant under the Federal constitution or Federal law. (a) An example in the first instance would be where the plaintiff has relied upon the Federal Act in question and the defendant has not removed the case to the Federal Court, but has contested its validity in the state court. (b) An example under the second instance is where the plaintiff seeks to recover under a state statute which the defendant claims to be superseded by the Federal Act in question and where the court holds the State Act is not superseded by such Federal Act and allows a recovery under the state law. (c) An example in the third instance is where an immunity from liability has been set up under the Fifth or Seventh Amendments to the Federal Constitution and the state court has sanctioned the validity of the Federal Act; or where the defendant has specially set up and claimed a right or immunity under such Federal Act and that right or immunity has been denied by the state court. The burden is upon the party desiring to secure a right to review a state court judgment in the Federal Supreme Court to put clearly upon the record of the state courts the partic-



ular right or immunity claimed by him under the Federal Constitution or the Federal Act.

§ 144. **Statute not retroactive.**—The statute in question is prospective, not retroactive. It does not give a remedy for an injury sustained before its enactment.<sup>10</sup>

§ 145. **State statutes requiring notice of injury to be given before bringing action.**—A state statute which requires notice of an injury be given defendant before the action to recover damages therefor, has no application to an action under this statute.<sup>11</sup>

<sup>10</sup> 254 Stat. at Large, 826. The following cases can be consulted: Osborn v. Detroit, 32 Fed. Rep. 36; Eastman v. County of Clackamas, 32 Fed. Rep. 24; Humboldt, etc., Co. v. Christopherson, 73 Fed. Rep. 239; Wright v. Southern Ry. Co. 80 Fed. Rep. 260; Plummer v. Northern Pac. Ry. 152 Fed. Rep. 206; Hall v. Chicago,

etc., R. Co. 149 Fed. Rep. 564; Winfree v. Northern Pac. Ry. Co. 164 Fed. Rep. 698 (decision on this statute); Winfree v. Northern Pacific Ry. 173 Fed. 65; affirming 164 Fed. 698 (decision on the statute).

<sup>11</sup> El Paso & N. E. Ry. Co. v. Gutierrez, 215 U. S. 87; 30 Sup. Ct. 21; 54 L. Ed. —.

## PART II.

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### Safety Appliance Acts.



## CHAPTER IX.

### ORIGIN, OBJECT, CONSTITUTIONALITY AND INTER- PRETATION OF STATUTE.

#### SECTION

146. Origin of Safety Appliance Act.

147. Resolution of American Railway Association.

#### SECTION

148. Object of statute.

149. Constitutionality of statute.

150. Interpretation of statute.

150a. State legislation concerning safety appliances.

§ 146. **Origin of Safety Appliance Act.**—The origin of the Safety Appliance Act was largely due to President Harrison, who repeatedly urged its passage upon Congress, both in public messages and privately upon individual congressmen. In his first annual message to Congress on December 3, 1889, he used this language: "The attention of the Interstate Commerce Commission has been called to the urgent need of congressional legislation for the better protection of the lives and limbs of those engaged in operating the great interstate freight lines of the country, and especially of the yardmen and brakemen. A petition, signed by nearly ten thousand railway brakemen, was presented to the commission asking that steps might be taken to bring about the use of automatic brakes and couplers on freight trains. At a meeting of state railroad commissioners and their accredited representatives, held at Washington in March last, upon the invitation of the Interstate Commerce Commission, a resolution was unanimously adopted urging the commission 'to consider what can be done to prevent the loss of life and limbs in coupling and uncoupling freight cars and in handling the brakes of such cars.' During the year ending June 30, 1888, over two thousand railroad employes were killed in service, and more than twenty thousand injured. It is com-

petent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subject to a peril of life and limb as great as that of a soldier in time of war.”<sup>1</sup> In his annual message of December 1, 1890, President Harrison again said: “It may still be possible for this Congress to inaugurate, by suitable legislation, a movement looking to uniformity and increased safety in the use of couplers and brakes upon freight trains engaged in interstate commerce. The chief difficulty in the way is to secure agreement as to the best appliances, simplicity, effectiveness and cost being considered. This difficulty will only yield to legislation, which should be based upon full inquiry and impartial tests. The purpose should be to secure the co-operation of all well disposed managers and owners; but the fearful fact that every year’s delay involves the sacrifice of two thousand lives and the maiming of twenty thousand young men should plead both with Congress and the managers against any needless delay.”<sup>2</sup> In his annual message of December 9, 1891, he again said: “I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employes, but nothing has yet been done. During the year ending June 30, 1890, 369 brakemen were killed and 7,841 maimed while engaged in coupling cars. The total number of railroad employes killed during the year was 2,451, and the number injured 22,390. This is a cruel and largely needless sacrifice. The government is spending nearly \$1,000,000 annually to save the lives of shipwrecked seamen; every steam vessel is rigidly inspected and required to adopt the most approved safety appliances. All this is good. But how shall

<sup>1</sup> Messages and Papers of Presidents, Vol. 9, p. 51.

<sup>2</sup> Messages and Papers of the Presidents, Vol. 9, p. 126.



we excuse the lack of interest and effort in behalf of this army of brave young men who in our land commerce are sacrificed every year by the continued use of antiquated and dangerous appliances? A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent. of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used, and would very soon and very greatly reduce the present fearful death rate among railroad employes.”<sup>3</sup> In his final annual message of December 5, 1892, he again alluded to the subject as follows: “In renewing the recommendation which I have made in three preceding annual messages that Congress should legislate for the protection of railroad employes against the dangers incident to the old and inadequate methods of braking and coupling which are still in use upon freight trains, I do so with the hope that this Congress may take action upon the subject. Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven styles of car couplers reported to be in use, and that during the same period there were 2,660 employes killed and 26,140 injured. Nearly sixteen per cent. of the deaths occurred in the coupling and uncoupling of cars and over thirty-six per cent. of the injuries had the same origin.”<sup>4</sup> As a result of these messages, President Harrison, on March 2, 1893, two days before the expiration of his term of office, had the satisfaction of realizing the fruition of his recommendations and endeavors, and in signing the present Safety Appliance Act. On April 1, 1896, Section 6

<sup>3</sup> Messages and Papers of the Presidents, Vol. 9, p. 208.

<sup>4</sup> Messages and Papers of the Presidents, Vol. 9, p. 331. See also Senate Report of the First Session of the 52nd Congress (No. 1049) and the House Report of the same session (No. 1678), setting out the numerous and increasing casualties due to coup-

ling, the demand for protection, and the necessity of automatic couplers coupling interchangeably. *Johnson v. Southern Pacific Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158. For debates in Congress on the Safety Appliance Act, see 24 Cong. Rec., pt. 2, pp. 1246, 1273, *et seq.*

of the act was amended; and on March 2, 1903, a supplementary act was adopted.<sup>5</sup>

**§ 147. Resolutions of American Railway Association.—**

On June 6, 1893, the American Railway Association, pursuant to the provisions of Section 5, adopted and certified to the Interstate Commerce Commission the following resolutions, viz: (1) "*Resolved*, That the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the draw bars, for standard gauge railroads in the United States, shall be thirty-four and one-half inches, and the maximum variation from such standard heights to be allowed between the draw bars of empty and loaded cars shall be three inches." (2) "*Resolved*, That the standard height of draw bars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for the narrow gauge railroads in the United States, shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars shall be three inches."<sup>6</sup>

**§ 148. Object of statute—Construction.**—It is clear that the intention of Congress in the passage of the Safety Appliance Act was to, in a measure secure the safety of

<sup>5</sup>The act provided that automatic couplers should be used on and after January 1, 1898, but the Interstate Commerce Commission extended the time two years, and subsequently seven months longer. *Johnson v. Southern Pacific Co.*, *supra*.

<sup>6</sup>Interstate Commerce Report, 1893, pp. 74, 263. *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281, 286; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; s. c. 74 Ark. 445; 78 S. W. Rep. 220; 83 Ark. 591; 98 S. W. Rep. 959.

A state court has held that the

provision of the Federal statute, authorizing the American Railway Association to fix the height of drawbars, is constitutional, and that the action of that association is valid and binding on interstate railway companies. *St. Louis, I. M. & S. Ry. Co. v. Neal*, 83 Ark. 591; 98 S. W. 958. For a history of this case (which was affirmed, *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281; 52 L. Ed. 1061; 28 Sup. Ct. 616), see *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559; 31 Sup. Ct. 612; 55 L. Ed. 582.

employees of railroads in moving cars in interstate commerce.<sup>7</sup> "Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy."<sup>8</sup> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with the absolute duty deemed by it more just."<sup>9a</sup> "The law was intended to protect the lives and safety of all employees, whether they are reason-

<sup>7</sup> *United States v. Southern Pacific Co.* 154 Fed. Rep. 897; *Crawford v. New York, etc., R. Co.* 10 Amer. Neg. Rep. 166; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95; 158 Fed. 931; 14 Amer. and Eng. Ann. Cas. 233. Referring to the opinion in this case just cited, although reversing it, the Supreme Court of the United States said: "The Circuit Court of Appeals well said, in the present case, that while the general purpose of the statute was to promote the safety of employees and travelers, its immediate purpose was to provide a particular mode to effect that result, namely, the equipping of each car used in moving interstate traffic with couplers, coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." *Delk v. St. Louis & S. F. R. Co.* 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590.

<sup>8</sup> *Chicago, etc., R. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 398; 56 Atl. 417; *Atlantic Coast*

*Line R. Co. v. United States*, 168 Fed. Rep. 175 (decided March 1, 1909); *Wabash R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *Southern Ry. Co. v. Snyder*, 187 Fed. 492; *United States v. Illinois Cent. R. Co.* 177 Fed. 801.

"I do not know whether statistics are obtainable as to whether the judgments obtained against and expense incurred by the companies were greater than those incurred in putting on the automatic coupler. But aside from all that, an undoubted purpose of Congress was humanitarian. The purpose was to end the maiming and killing of the vast army of men engaged in railroad work. And that the results have been good one now needs but look at the court dockets and the men newer in the railroad service and read the statistics of the past few years." *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486.

<sup>9a</sup> *St. Louis, I. M. Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. 616; 52 L. Ed. 1061; *Johnson v. Great Northern Ry. Co.* 178 Fed. 643; *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559; 31 Sup. Ct. 612; 55 L. Ed. 582.

ably prudent or not.”<sup>8b</sup> “The Safety Appliance Act is a remedial statute, and must be so construed as to accomplish the intent of Congress. Its provisions ‘should not be taken in a narrow sense.’ Nor should its undoubted humanitarian purpose be frittered away by judicial construction.”<sup>8c</sup>

**§ 149. Constitutionality of statute.**—There is no serious question concerning the constitutionality of the Safety Appliance Act. It has been expressly held to be constitutional.<sup>9</sup>

<sup>8b</sup> *United States v. Chicago, M. & St. P. Ry. Co.* Appendix G; *United States v. Southern Ry. Co.* Appendix G; *United States v. St. Louis S. W. Ry. Co.* Appendix G.

<sup>8c</sup> *Snyder v. Southern Pacific Ry. Co.* 187 Fed. 492.

The construction of the language of the Safety Appliance Acts is not controlled by the language or by the interpretation of the terms of the act to regulate commerce. *Pacific Coast R. Co. v. United States*, 173 Fed. 448; *United States v. Colorado & N. W. R. Co.* 157 Fed. 321.

“The amendment of 1903, 32 Stat. at L., 943, had three objects: First, to extend the Safety Appliance Act to traffic in the District of Columbia and the territories; second, to remove the doubt as to the meaning of the term ‘cars’ as used in the Act, created by the decision of this court in the *Johnson Case*, 117 Fed. 462; third, to enlarge the scope of the Safety Appliance Act, so as to include not only ‘the cars, locomotives, tenders, and similar vehicles,’ etc. therein referred to, but also to embrace ‘all other locomotives, tenders, cars, and similar vehicles used in connection therewith.’” *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. 236.

<sup>9</sup> *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918; *Philadelphia, etc., R. Co. v. Winkler*, 4 Pennewill (Del.), 387; 56 Atl. Rep. 112; affirmed, 4 Del. 80; 53 Atl. Rep. 90; *Spain v. St. Louis, etc., R. Co.* 151 Fed. Rep. 522; *Plummer v. Northern Pac. Ry.* 152 Fed. Rep. 206; *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; *S. C.* 74 Ark. 445; 78 S. W. Rep. 220; 83 Ark. 591; 98 S. W. Rep. 959; *Union Bridge Co. v. United States*, 204 U. S. 364; *Britfield v. Stanahan*, 192 U. S. 470; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457; *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486; *United States v. Great Northern Ry. Co.* 145 Fed. Rep. 438; *Chicago Junction Ry. Co. v. King*, 169 Fed. 372; *United States v. Baltimore & O. R. Co.* Appendix —; *Chicago, R. I. & P. Ry. Co.* 185 Fed. 80; *United States v. Boston & M. R. Co.* 168 Fed. 148; *Southern Ry. Co. v. Snyder*, 187 Fed. 492.

The Act of 1903 (Stat. at L., 943, Chap. 976) in aid of the statute did not render the original act unconstitutional. *United States v. Wheeling & L. E. R. Co.* 167 Fed. 198; *Southern Ry. Co. v. United States*, 222 U. S. —; 32



In passing upon the Federal Employers' Liability Act in the Supreme Court of the United States, the court refers to two cases<sup>10</sup> as settling the question of the validity of the Safety Appliance Act.<sup>11</sup> In still another case in the United States Supreme Court the question of the validity of the statute was practically settled.<sup>12</sup> And in a recent decision the validity of this statute has been put at rest by the Supreme Court, even holding that it is valid as to intrastate cars moved over an interstate railroad. The court said: "We come, then, to the question whether those acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by those acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and those who are employed in its movement? Or, stating it another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intra-

Sup. Ct. 2: 56 L. Ed. —; affirming 164 Fed. 347; *Watson v. St. Louis, I. M. & S. Ry. Co.* 169 Fed. 942; *Adair v. United States*, 208 U. S. 167; 28 Sup. Ct. 277; 52 L. Ed. 436; *Atlantic Coast Line v. United States*, 168 Fed. 175; *Wabash R. Co. v. United States*, 168 Fed. 1; *Kelly v. Great Northern Ry. Co.* 152 Ill. 211; *United States v. Wheeling & L. E. R. Co.* 167 Fed. 198; *United States v. Pennsylvania Co.*, Appendix.

<sup>10</sup> *Johnson v. Southern Pac. Co.* 196 U. S. 1, 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; and *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

<sup>11</sup> *Employee's Liability Act*, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297.

<sup>12</sup> *St. Louis, etc., R. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.



state as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the danger which threatens it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided were, in whole or in part, out of matters connected with intrastate commerce. Speaking only of railroads which use highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the same switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to injure the progress and imperil the safety of other trains. And so the absence of appropriate safety appliance from any part of any train is a menace not only to that train, but to others. These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative.”<sup>12a</sup>

<sup>12a</sup> Southern Ry. Co. v. United States, 222 U. S. 20; 32 Sup. Ct. 2; 56 L. Ed. —; affirming 164 Fed. 347. For a criticism of this decision, see 73 Cent. L. Jr. 423.

§ 150. **Interpretation of statute.**—The statute is to be construed liberally, as it were, for the protection of the employe. It requires of the railroad company a strict compliance with its terms. It was enacted for the preservation of the life and limbs of the employe, and to place upon the employer, so far as possible, the burden of the loss the employe has sustained by reason of his employer having failed to comply with the requirements of the statute in the construction or car couplers.<sup>13</sup> In a suit by the United States against a railroad to recover a penalty, it has been held that the action is a criminal one and the same interpretation should be applied to the statute as is applied to the usual penal statute.<sup>14</sup> On the other hand, in a suit by the United States, it is said: "This act of Congress is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate commerce."<sup>15</sup> "The primary object of the act," said Chief Justice Fuller, "was to promote the public welfare by securing the safety of employes and travelers, and it was in that aspect remedial, while for violation a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness

<sup>13</sup> *Plummer v. Northern Pac. Ry.* 152 Fed. Rep. 206; *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918; *Wabash R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); see *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061; s. c. 74 Ark. 445; 78 S. W. 220; 83 Ark. 591; 98 S. W. Rep. 959; *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; re-

versing 207 Pa. St. 198; 56 Atl. Rep. 417; *United States v. El Paso, etc., R. Co.* reported in Appendix; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. Chicago, etc., R. Co.* 149 Fed. Rep. 486; *United States v. Great Northern Ry. Co.* 150 Fed. Rep. 229.

<sup>14</sup> *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182.

<sup>15</sup> *United States v. Central of Ga. Ry.* 157 Fed. Rep. 893.

of construction."<sup>16</sup> The construction of the language of the Safety Appliance Act is not controlled by the interpretation of the terms of the act to regulate commerce.<sup>17</sup>

**§ 150a. State legislation concerning safety appliances.—**

In a number of states, laws have been enacted with reference to safety appliances on railroad locomotives, cars and vehicles; and it is important to know whether those laws are valid in view of the power of Congress to legislate upon that subject under the interstate commerce clause. Although broad enough in its terms, the Federal Safety Appliance Act does not apply to cars wholly engaged in intrastate commerce and not used on a highway of interstate commerce.<sup>18</sup> The state of Ohio enacted a law in almost the exact language of the Federal Safety Appliance Act with reference to automatic couplers, but limited it to a "locomotive, car, tender, or similar vehicle used in moving state traffic." In an action against an interstate railroad

<sup>16</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *United States v. Colorado, etc., R. Co.* 157 Fed. Rep. 321; *Chicago, etc., R. Co. v. King.* 169 Fed. Rep. 372 (decided February 3, 1909); *Wabash Ry. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *Atlantic, etc., R. Co. v. United States* 168 Fed. Rep. 175 (decided March 1, 1909).

"The act of Congress is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate commerce." *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893; *Southern Ry. Co. v. Snyder*, 187 Fed. 492; *United States v. Baltimore & O Ry. Co.* 170 Fed. 456.

<sup>17</sup> *Pacific Coast Ry. Co. v. United States*, 173 Fed. 448 (but see *United States v. Geddes*, Appendix); *United States v. Chicago G. W. Ry. Co.* 162 Fed. 775; *Voelker v. Chicago, M. & St. P. Ry. Co.* 116 Fed. 867; *United States v. Chicago, R. I. & P. Ry. Co.* 173 Fed. 684; *United States v. Chicago, M. & St. P. Ry. Co.* 149 Fed. 486; *United States v. Southern Ry. Co.* 135 Fed. 122; *United States v. Southern Ry. Co.* 170 Fed. 1014; *United States v. Atlantic Coast Line R. R. Co.* 153 Fed. 918; *United States v. Illinois Central R. R. Co.* 156 Fed. 182; *United States v. Chicago & N. W. Ry. Co.* 157 Fed. 616; *United States v. Terminal R. Assn.* Appendix G.

<sup>18</sup> *Louisville & N. R. Co.* 186 Fed. 280; *Employers' Liability Cases*, 207 U. S. 463; 28 Sup. Ct. 141; 52 L. Ed. 297; *United States v. Erie R. Co.* 166 Fed. 352.

company to recover a penalty for failing to equip a railroad car "moving in state traffic," the defendant set up that the car was used on its interstate railroad and was not therefore subject to the Ohio statute. In the discussion of the case counsel for the defendant road asked three questions, and contended that each of them should receive an answer in the affirmative: "(1) Does the fact that the car in question was commonly and usually employed in interstate traffic, although it was at the particular time actually carrying intrastate traffic, subject it to the Federal control in such wise as to take it out of state control? (2) Does the fact that it was a part of a train containing other cars loaded with interstate traffic (and which are therefore subject to the Federal Act) have the effect to bring this particular car also within the operation of the Federal Act in such wise as to take it out of state control? (3) Does the fact that the railroad was commonly and usually employed in interstate commerce and that defendant was engaged in business as an interstate carrier, have such effect?" The court answered each of those questions in the negative, saying: "If the statute regulates interstate commerce, or creates regulations in conflict with Federal regulation of such commerce, it is invalid. In *Atlantic Coast Line Railroad Company v. Wharton*,<sup>19</sup> it is held that 'Any exercise of state authority, whether made directly or through the instrumentalities of a commission, which directly regulates interstate commerce is repugnant to the commerce clause of the Federal Constitution.' The statute in question does not purport to be a regulation of interstate traffic, but is limited strictly to the moving of traffic from one point to another in the state, and it is evident from its various requirements as well as its title that it was passed in the exercise of the police power of the state to promote the safety in the state of employees and travelers upon railroads, and without any thought or intention of meddling with interstate commerce."

<sup>19</sup> 207 U. S. 328; 28 Sup. Ct. 121; 52 L. Ed. —.



The court then quoted from the Federal Safety Appliance Act as well as from a Federal decision<sup>20</sup> passing upon a state statute on the subject of automatic couplers, and says: "Our statute does not conflict with the Federal statute in the character of the coupler, but require the same kind of coupler, and was passed to promote the same object, though under a different power, and, while no doubt it was enacted to apply to cars assumed not to be covered by the Federal statute, it is not unreasonable, and is not void merely because a failure to equip the car with automatic couplers would subject the railroad company to punishment under a state statute, as well as under the act of Congress. 'The same act or service of act may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government.'<sup>21</sup> The regulation of commerce among the states is within the exclusive jurisdiction of Congress, but it is well-settled that a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce or in conflict with Federal regulation, but merely regulating the instrumentalities of commerce, is not void; and when such state regulations do conflict with Federal regulations they are not void on the ground that the state has exercised a power exclusively in Congress, but because the Constitution and the laws of the United States made in pursuance thereof are the supreme laws of the land." The court then quotes from *Asbell v. Kanas*,<sup>22</sup> that "while the state may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with the Congressional legislation on the subject involved is not necessarily unconstitutional, because it may have an indirect effect upon interstate commerce," and also from *Missouri Pacific Railway Company v. Lara-*

<sup>20</sup> *Voelker v. Chicago, M. & St. P. Ry. Co.* 129 Fed. 522; reversing 116 Fed. 867.

<sup>21</sup> *Cross v. North Carolina*, 132

U. S. 131; 10 Sup. Ct. 47; 46 L. Ed.

<sup>22</sup> 209 U. S. 251; 28 Sup. Ct. 485; 52 L. Ed. 778.



*bee Flour Mills Company*,<sup>23</sup> when a peremptory writ of mandamus was allowed by the Supreme Court of Kansas, commanding one railroad company to transfer cars to and from a mill or another railroad, and which was affirmed, in which it was said by Mr. Justice Brewer: "The roads are, therefore, engaged in both interstate commerce and that within the state. In the former they are subject to the regulation of Congress; in the latter to that of the state, and to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved." "Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the state all power in respect to regulation of a local character. This proposition cannot be sustained." The court also quotes from the dissenting opinion of Mr. Justice Moody: "I venture to think that the weight of authority establishes the following principles: The commerce laws of the Constitution vests the power to regulate interstate commerce exclusively in the Congress and leaves the power to regulate intrastate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the state may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect affect may be allowed to operate until the Congress enacts legislation conflicting with it, to which it must yield as the paramount power." The Ohio court then adds: "It follows that the question propounded by counsel should receive a negative answer."<sup>24</sup> But in view of the recent decision of the

<sup>23</sup> 211 U. S. 612; 29 Sup. Ct. 214; 53 L. Ed. 352.

<sup>24</sup> *Detroit, T. & I. Ry. Co. v. State*, 82 Ohio St. 60; 91 N. E. 869.

A similar decision has been rendered upon a Nebraska statute which provided that "in all actions hereafter brought against any railway company to recover damages

Supreme Court of the United States holding that intrastate cars moving on "a highway of interstate commerce,"<sup>25</sup> it may be questioned whether the Ohio statute is not void; for the Federal Safety Appliance Act applies in exactly the same way to cars and in state commerce in Ohio as does the Ohio statute; and Congress having taken over to itself legislation on that point, can the state legislate upon it? But we think the answer to this is that so long as the statutes are identical in effect as applied to intrastate commerce, the state may inflict punishment for failure to comply with its own statute, and Congress may likewise do so with reference to its own statute.<sup>26</sup>

for personal injuries to any employee or when such injuries have resulted in his death the fact that such employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Pacific Ry. Co. v. Castle* 172 Fed. 841.

A state statute regulating the speed of railway trains at highway crossings is not invalid as

applied to interstate trains, Congress not having legislated on the subject. *Southern Ry. Co. v. King*, 217 U. S. 524; 30 Sup. Ct. 594; 54 L. Ed. —; affirming 160 Fed. 332; 87 C. C. A. 284.

<sup>25</sup> See Sec. 159.

<sup>26</sup> The Ohio Statute requires the coupling to be so constructed that it will couple by impact. *McGavey v. Detroit, T. & I. Ry. Co.* 83 Ohio St. 273; 94 N. E. 424.

The Illinois statute, almost identical with the Federal statute has been held constitutional. *Luken v. Lake Shore & M. S. Ry. Co.* 248 Ill. 377; 94 N. E. 175.

## CHAPTER X.

### USE IN INTERSTATE TRAFFIC.

#### SECTION

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#### SECTION

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§ 151. What is interstate commerce—Test.—“Importation into one state from another,” said Judge Sanborn, “is the indispensable element in the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a pre-

scribed destination in another is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed, and they there mingle with and become a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destination in the other, and every one who participates in it, who carries the goods through any part of their continued passage, unavoidably engages in interstate commerce.”<sup>1</sup>

**§ 152. What is interstate commerce.**—In discussing the question of interstate commerce and what it is, the Supreme Court of the United States used the following language, which has been applied in the construction of the Safety Appliance Act: “In this case it is admitted that the steamer was engaged in shipping and transporting down Grand river goods destined and marked for other states than Michigan, and in receiving and transporting up the river goods brought

<sup>1</sup> United States v. Colorado, etc., R. Co. 157 Fed. Rep. 321; citing Rhodes v. Iowa, 170 U. S. 412; 18 Sup. Ct. Rep. 664; 42 L. Ed. 1088; reversing 90 Iowa, 496; 58 N. W. Rep. 887; 21 L. R. A. 245; Kelley v. Rhoades, 188 U. S. 1; 23 Sup. Ct. Rep. 259; 47 L. Ed. 359; reversing 9 Wyo. 352; 87 Am. St. Rep. 959; 63 Pac. Rep. 935; Houston, etc., Co. v. Ins. Co. 89 Tex. 1; 32 S. W. Rep. 889; 30 L. R. A. 713; 53 Am. St. Rep. 17; Leisy v. Hardin, 135 U. S. 100; 10 Sup. Ct. Rep. 681; 34 L. Ed. 128; reversing 78 Iowa, 286; 43 N. W. 188; Lyng v. Michigan, 135 U. S. 161; 10 Sup. Ct. Rep. 725; 34 L. Ed. 150; reversing 74 Mich. 579; 42 N. W.

Rep. 139; Caldwell v. North Carolina, 187 U. S. 622; 23 Sup. Ct. Rep. 229; 47 L. Ed. 336; reversing 127 N. C. 521; 37 S. E. Rep. 138.

The act approved March 2, 1903, is not unconstitutional, and the Employers' Liability Cases, 207 U. S. 463; 28 Sup. Ct. Rep. 143; 52 L. Ed. 297, is not in point; for the statute then under consideration applied to the individuals or corporations engaged in interstate commerce, whereas the Automatic-Safety Appliance Act is addressed alone to an instrument of interstate commerce, viz., an interstate railroad. United States v. Southern Ry. Co. 164 Fed. Rep. 347; affirmed, 222 U. S. 20; 32 Sup. Ct. 2; 56 L. Ed.

within the state from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the state, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other states, or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce, for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress. It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over



interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."<sup>2</sup>

**§ 153. Interterritorial commerce—Act of 1903.**—The inter-territorial commerce designated in the Act of 1903 is equivalent to the interstate commerce under the Act of 1893. In an action for a violation of the statute in a territory the complaint will not be defective for a failure to allege that the defendant is a common carrier engaged in interstate commerce, if it alleges that the defendant is a common carrier engaged in commerce by railroad among the several territories of the United States, particularly the territories of Arizona and New Mexico.<sup>3</sup>

**§ 154. Use of car forbidden.**—In the first section of the statute it is declared that "it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine" not equipped with a driving-wheel brake; and in the sixth section, as amended in 1896, it is provided, "That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in

<sup>2</sup> The *Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999, reversing *Brown*, Admr. Cas. 193; Fed. Cas. No. 3564, used in *United States v. Colorado*, etc., Ry. Co. 157 Fed. Rep. 321; *Elgin*, etc., R. Co. v. *United States*, 168 Fed. Rep. 1.

A car billed on defendant's line of railroad in Illinois to a destination in Missouri is a car used in moving interstate traffic, although the defendant does not haul the car from one state to another. *United States v. Southern Ry. Co.* 135 Fed. Rep. 122.

No system can be devised to turn interstate commerce into in-

trastate commerce. *United States v. Chicago*, etc., R. Co. 149 Fed. Rep. 486.

Where a car is loaded in one state with a commodity destined for another state, and begins to move, then interstate commerce has begun and does not cease until the car has arrived at its point of final destination. *United States v. Atlantic Coast Line R. Co.* 168 Fed. Rep. 175 (decided February 24, 1909); Appendix G, p. 372.

<sup>3</sup> *United States v. El Paso*, etc., R. Co. Appendix G.

violation of the provisions" of the act shall be liable to a penalty. Section second provides that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." By reason of the language of this statute it is clear that it is only the use of insufficiently equipped cars that is forbidden; and, of course, the hauling of the car is a use. The ownership of the car is immaterial.<sup>4</sup> It is not the mere fact of the ownership of a car, defectively, or not at all, equipped even though there be an intent to use or haul it, that constitutes the offense against the statute; but the offense against or violation of the statute is its actual use or hauling it. "The act of 1893 makes it unlawful for a company to do certain things: *First*, to haul the car. *Second*, to permit the car to be hauled. *Third*, to use or permit a car to be used. All three of these prohibitions are with reference to cars on the lines of the company within this judicial district. And the prohibitions are with reference to cars used only in interstate traffic and which are not equipped with couplers coupling automatically by impact and which cars can be coupled without the necessity of men going between the ends of the cars."<sup>5</sup> It is immaterial what is the purpose of the movement of the car nor the distance it is hauled, nor whose car it is. If the car is defective the railroad company is liable.<sup>6</sup>

<sup>4</sup> *Crawford v. New York, etc., R. Co.* 10 Am. & Eng. R. Cas. 166; *United States v. Chicago, etc., R. Co.* 143 Fed. Rep. 353; *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486.

<sup>5</sup> *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486; *United States v. Northern Pac. T. Co.* 144 Fed. Rep. 861; *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1; *Chicago, etc., R. Co. v. United States*, 168 Fed. Rep. 236;

*United States v. Southern Pacific Ry. Co.* Appendix G; *United States v. Southern Pacific Co.* 169 Fed. 407.

<sup>6</sup> *United States v. Northern Pac. T. Co.* 144 Fed. Rep. 861; *United States v. Chicago, etc., R. Co.* 143 Fed. Rep. 353; *United States v. Southern Ry. Co.* 15 Fed. Rep. 122; *Crawford v. New York, etc., R. Co.* 10 Am. & Eng. R. Cas. 166. If the car is one that is regularly used in the move-

§ 155. Inhibition of statute—Car employed in interstate traffic.—“The statute was designed to inhibit the hauling or using by any railroad company in its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, etc., the denouncement being against the use of the car. It makes but little difference, therefore, whether the car contained at the time any commodity being carried as freight or not, if the car was one being used in moving interstate traffic, not in the sense that at the particular time it was going, loaded or partially so with a commodity being shipped from one state into another or others, but that it was being employed in a service that was moving interstate traffic.”<sup>7</sup> A car loaded with coal, to be delivered to a consignee in another state, is used “in moving interstate traffic,” if hauled by a railroad company in taking it from the place of loading, although such com-

ment of interstate traffic, and is at the time involved in the movement of a train containing interstate traffic, the lading of the car is wholly immaterial. *United States v. Wheeling* (see Appendix G).

<sup>7</sup>*United States v. Northern, etc., Ry. Co.* 144 Fed. Rep. 861. In this case the court adds: “Such is the construction given the law by Shiras, district judge in *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867, and affirmed by Mr. Chief Justice Fuller in *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462.” “The words ‘used in moving interstate traffic’ should not be taken in a narrow sense.” *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 497; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *United States v. Chicago, etc., Ry. Co.* 143 Fed. Rep. 373.

“The railway locomotive, train, or car, or the car as a constituent of the train, that goes from State to State carrying wholly, or in part, any interstate commerce are for the time being instrumentalities of interstate commerce; as also the locomotive train, or car that, though not going out of the State, carries on its way through the State traffic that is interstate transit; and the obverse of that would seem to be that a train traveling wholly between points in the same State, and not going out of the State, and carrying wholly commerce originating in the State, destined to points in the same State, is not for the time being an instrument of interstate commerce.” *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1; *Wabash, etc., R. Co. v. United States*, 168 Fed. Rep. 1. But see now the interpretation placed upon this statute by the Supreme Court of the United States, Sec. 159.

pany only undertakes to deliver it to a connecting carrier within the same state.<sup>8</sup> And this is true, although it only hauls it through its own yards.<sup>9</sup> A railroad company hauling its own rails from one state to another, to be there used by it, is engaged in interstate commerce.<sup>10</sup> But it has been held that coal mined in Kentucky and there loaded, and then billed and shipped to another place in the same state, is not turned into interstate commerce by the fact that in its route it passed through a part of another state.<sup>11</sup>

<sup>8</sup> *United States v. Southern Ry.* Co. 135 Fed. Rep. 122.

<sup>9</sup> *United States v. Pittsburg, etc., R. Co.* 143 Fed. Rep. 360; *contra*, *McCutcheon v. Atlantic, etc., R. Co.* 81 S. C. 71; 61 S. E. Rep. 1108. But hauling empty intrastate cars in an interstate train is within the statute. *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1.

<sup>10</sup> *United States v. Chicago, etc., R. Co.* 149 Fed. Rep. 486; affirmed, 165 Fed. 423; 91 C. C. A. 373.

So it is a violation of the statute for a company to haul sand for itself in improperly equipped cars from one state to another. *United States v. Southern R. Co.* 167 Fed. 198; Appendix G.

<sup>11</sup> *Louisville, etc., R. Co. v. Vancleave*, 23 Ky. L. Rep. 479; 63 S. W. Rep. 22; *Louisville, etc., R. Co. v. Walker*, 23 Ky. L. Rep. 453; 63 S. W. Rep. 20. See *Commonwealth v. Lehigh Valley R. Co.* (Pa.); 17 Atl. 179; *Lehigh Valley R. Co. v. Commonwealth*, (Pa.); 18 Atl. 125; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418; 10 Sup. Ct. 462, 702; 33 L. Ed. 970; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192; 12 Sup. Ct. 806; 36 L. Ed. 672; *Cincinnati Packet Co. v. Bay*,

200 U. S. 179; 26 Sup. Ct. 208; 50 L. Ed. 428; *United States v. Lehigh Valley R. Co.* 115 Fed. 373; *Campbell v. Chicago, etc., R. Co.* 86 Iowa 641; 53 N. W. 323; *Seawell v. Kansas City, etc., R. Co.* 119 Mo. 222; 24 S. W. 1002. But the United States Court held it is interstate commerce. *United States v. Erie R. Co.* 163 Fed. Rep. 352. See *Hanley v. Kansas City So. Ry. Co.* 187 U. S. 618; 23 Sup. Ct. Rep. 214; 47 L. Ed. 33; affirming 106 Fed. Rep. 353; *Sternberg v. Cape Fear & Y. V. R. Co.* (N. C.) 7 S. E. 836; *State v. Chicago, St. P., M. & O. R. Co.* 40 Minn. 267; 41 N. W. 1047; *New Orleans Cotton Exchange v. Cincinnati, etc., R. Co.* 2 Interstate Com. Rep. 289; *Kansas C. S. Ry. Co. v. R. R. Commission*, 106 Fed. 359; *United States v. Erie R. Co.* 166 Fed. 352; *Shelby, etc., Co. v. Southern Ry. Co.* 147 N. C. 66; 60 S. E. 721; *Davis v. Southern Ry. Co.* 147 N. C. 68; 60 S. E. 722; *St. Louis & S. F. Ry. Co. v. State*, 87 Ark. 562; 113 S. W. 203; *Mires v. St. Louis & S. F. Ry. Co.* 134 Mo. App. 379; 114 S. W. 1052. Cases cited in this section must now be read in the light of the recent decisions of the United States Supreme Court. See Sec. 159.



§ 156. **Car in use, what is**—A loaded car from another state, not yet delivered to the consignee at the time of its stoppage in a railroad yard at its destination and shunted on a side track for repairs to its coupler which had become defective, is still a car used in interstate commerce. "Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and the car was being hauled upon the track when the accident occurred."<sup>12</sup> It is the use of the car that is the test.<sup>12a</sup>

§ 157. **Empty car in interstate train.** The statute does not state whether it applies to loaded or unloaded cars, and it therefore applies to a defective empty car hauled in an interstate train.<sup>12b</sup> "Here is a train which is engaged—at least a part of it—in interstate commerce, and so long as that is true every car in the train is impressed, so far as

<sup>12</sup> St. Louis, etc., R. Co. v. Delk, 158 Fed. Rep. 931; citing Johnson v. Southern Pacific Co. 136 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; Chicago, etc. R. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 226; 70 L. R. A. 264.

In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition. United States v. Lehigh Valley R. Co. 162 Fed. Rep. 410 (see 160 Fed. 696, Appendix G); United States v. Philadelphia, etc., R. Co. 162 Fed. Rep. 405 (see Appendix G, p. 315); United States v. Pennsylvania R. Co. 162 Fed. Rep. 408 (see Appendix G); United States v. Philadelphia, etc., R. Co. 160 Fed. Rep. 696; 162 Fed. Rep. 403.

Judge Lurton dissented, distinguishing the case from the Johnson case, and Railway v. Bowles, 71

Miss. 1003; 15 So. Rep. 138, and Taylor v. Boston Ry. 189 Mass. 390; 74 N. E. Rep. 591, arising under similar state statutes.

<sup>12a</sup> United States v. Southern Pacific Ry. Co. 167 Fed. 699.

<sup>12b</sup> See Sec. 180; Norfolk & W. Ry. Co. v. United States, 177 Fed. 623; Hohenleitner v. Southern Pacific Co. 177 Fed. 796; Chicago & N. W. Ry. Co. v. United States, 168 Fed. 238; Southern Ry. Co. v. Snyder, 187 Fed. 497; United States v. Louisville & N. R. Co. 162 Fed. 185. (Such is the Illinois statute. Luken v. Lake Shore & M. Ry. Co. 248 Ill. 377; 94 N. E. 175.) United States v. Chicago & N. W. Ry. Co. 157 Fed. 616; reversed, 168 Fed. 236; Kelly v. Great Northern, 152 Fed. 211; Snead v. Central of Georgia, 151 Fed. 608; Louisville & N. R. Co. v. United States, 174 Fed. 1021; 98 C. C. A. 664; Elgin, etc., R. Co. v. United States, 168 Fed. 1.



the requirements of this act are concerned, with an interstate character. It is a part of the current. The empty car may at any moment be coupled to the interstate car. A brakeman engaged in performing some duty in respect to the interstate car may be compelled to pass over or use a grab-iron on the empty car or couple the empty car to the interstate car. Endless confusion would arise if any distinction was made under such conditions between a car loaded with interstate traffic and an empty car regularly used in the movement of interstate traffic, but at the time unloaded and coupled to another car actually in use in the movement of interstate traffic. Of course, the same thing must be said of the loaded car, whatever the character of the freight it carries, if it is a car regularly used in the movements of interstate traffic.”<sup>12c</sup> “It is enacted that ‘no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.’ There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance.”<sup>12d</sup>

**§ 153. Hauling or using car not loaded with interstate traffic in interstate train.**—The statute covers an instance of using or hauling in an interstate train a car not loaded with interstate traffic nor hauled from one state to another. The statute, as amended in 1896,<sup>13</sup> prohibits the “hauling or permitting to be hauled or used on its line, any car in violation” of the Safety Appliance Act. “The older statute

<sup>12c</sup> United States v. Wheeling & L. E. R. Co. 167 Fed. 198; St. Louis & S. F. R. Co. v. Delk, 158 Fed. 931; 86 C. C. A. 95; Chicago Junction Ry. v. King, 169 Fed. 372; 94 C. C. A. 652; United States v. Southern Pacific Ry. Co. 169 Fed. 407; 94 C. C. A. 629; Southern Ry. Co. v. Snyder, 187 Fed. 492.

<sup>12d</sup> St. Louis & I. M. Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. 616; 52 L. Ed. 1061; United States v. Baltimore & O. R. Co. 170 Fed. 456.

“The train rather than the car” is the test, it was held. Erie R. Co. v. Russell, 183 Fed. 722; Felt v. Denver & G. R. Co. 46 Colo. 249; 110 Pac. 215, 1136.

<sup>13</sup> Section 6 of Act.

was with reference only to cars used in moving interstate traffic regardless of whether it was a local road or one extending into several cases. The reported cases, and the reports of the Interstate Commerce Commission, show that it was often difficult to prove in what traffic, local or interstate, the car was being used, and without such evidence neither state nor national prosecution could be carried on. And to cure that defect, the latter statute covers all cars used on any railroad engaged in interstate traffic regardless of whether the particular car was for local or interstate use.”<sup>14</sup>

**§ 159. Intrastate car on interstate railroad.**—This phase of the statute has recently received careful attention by the Supreme Court of the United States. A railroad company was indicted and convicted on these facts, as stated by that court: “The defendant, while operating a railroad which was ‘a part of a through highway’ over which traffic was continually being moved from one state to another, hauled over a part of its railroad, during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic, and the other three in moving intra-

<sup>14</sup> United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486; Southern Ry. Co. v. United States, 222 U. S. 20; 32 Sup. Ct. 2; 56 L. Ed. affirming 164 Fed. 347.

Cars hauled from one point in a state to another point in the same state, loaded with intrastate commerce, but in an interstate train, must be equipped with automatic couplers. Elgin, etc., R. Co. v. United States, 168 Fed. Rep. 1; United States v. Great Northern Ry. Co. 145 Fed. 438; Chicago Junction Ry. Co. v. King, 169 Fed. 372; United States v. Chicago, M. & St. P. Ry. Co. 149 Fed. 486; United States v. Chicago G. W. R. Co. 162 Fed. 775; United States v. Pacific Coast Ry. Co. 173 Fed.

453; United States v. Southern Ry. Co. 164 Fed. 347; United States v. Atlantic Coast Line, Appendix G; United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775. And so must empty cars hauled in an interstate train. United States v. Erie R. Co. 166 Fed. Rep. 352; Erie R. Co. v. Russell, 183 Fed. 722; United States v. International & G. N. R. Co. 174 Fed. 638; Wabash R. Co. v. United States, 168 Fed. 1; 93 C. C. A. 93; Pacific Coast Ry. Co. v. United States, 173 Fed. 448; Louisville & N. R. Co. v. United States, 186 Fed. 280; Felt v. Denver & R. G. R. Co. 48 Colo. 249; 110 Pac. 215, 1136.

tate traffic; but it does not appear that the use of the three was in connection with any car or cars used in interstate commerce. The defendant particularly objected to the assessment of any penalty for the hauling of the three cars, and insisted, first, that such a hauling in intrastate commerce, although upon a railroad over which traffic was continually being moved from one state to another, was not within the prohibition of the Safety Appliance Acts of Congress; and, second, if it was, those acts should be pronounced invalid, as being in excess of the power of Congress under the commerce clause of the Constitution.”<sup>14a</sup> It will thus be perceived that the court had before it the question of hauling cars on an interstate railroad without their being hauled in an interstate train—the hauling of cars in intrastate commerce. The court then proceeds, after the statement quoted, by first giving an historical review of the statutes, as follows: “The original act of March 2, 1893,<sup>14b</sup> imposed upon every common carrier ‘engaged in interstate commerce by railroad’ the duty of equipping all trains, locomotives, and cars used on its line of railroad in moving interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employees engaged in its movement; and the second section of that act made it unlawful for ‘any such common carrier’ to haul or permit to be hauled or used on its line of railroad any car ‘and in moving interstate traffic,’ not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. The act of March 2, 1903,<sup>14c</sup> amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should ‘apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the terri-

<sup>14a</sup> The statute in this respect was held to be constitutional. See Sec. 149. The case reported below is *United States v. Southern Ry. Co.* 164 Fed. 347.

<sup>14b</sup> 27 Stat. at L., 531, Chap. 196; U. S. Comp. Stat. 1901, p. 3174.

<sup>14c</sup> 32 Stat. at L., 943, Chap. 973; U. S. Comp. Stat. Supp. 1909, p. 1143.

tories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith.' Both the acts contained some minor exceptions, but they have no real bearing here." The court then proceeds: "The real controversy is over the true significance of the words 'on any railroad engaged' in the first clause of the amendatory provision. But for them the true test of the application of that clause to locomotive, car, or similar vehicle would be, or it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. And so certain is this that we think there would be no contention to the contrary were it not for the presence in the amendatory provision of the third clause—'and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith.' In this there is a suggestion that what precedes does not cover the entire field; but at most it is only a suggestion, and gives no warrant for disregarding the plain words, 'on any railroad engaged' in the first clause. True, if they were rejected, the two clauses, in the instance of a train composed of many cars, some moving in interstate traffic and others moving in intrastate traffic, would, by their concurrent operation, bring the entire train within the statutes. But it is not necessary to reject them to accomplish this result, for the first clause, with these words in it, does even more; that is to say, it embraces every train on a railroad which is a highway of interstate commerce, without regard to the class of traffic which the cars are moving. The two clauses are in no wise antagonistic, but, at most, only redundant; and we perceive no reason for believing that Congress intended that less than the full effect should be given to the more comprehensive one, but, on the contrary, good reason for believing otherwise. As between the two opposing



views—one rejecting the words ‘on any railroad engaged’ in the first clause, and the other treating the third clause, as redundant—the latter is to be preferred, first, because it is in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective; and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in process of adoption<sup>14d</sup> thus making it certain that without them the act would not express the will of Congress. For these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.”<sup>14e</sup> According to this decision the test of a railroad company’s liability is the use of a vehicle on its “railroad which is a highway of interstate commerce,” and it is not necessary to show that interstate traffic was in the car or in some part of the train in which it was being moved or hauled. In many of the earlier cases, therefore, where the railroad companies were held liable on the ground that the car was loaded with interstate traffic or was incorporated in a train hauling interstate traffic, the judgments of the court were correct, though placed upon grounds different from that taken by the Supreme Court. By this decision it is not necessary to prove that interstate traffic was aboard the car or train, it being sufficient to show that the defendant’s railroad was

<sup>14d</sup> Fifty-seventh Cong., 1st Sess., Vol. 35, pt. 7, p. 7300; *Id.* 2d. Sess., Vol. 36 pt. 3, p. 2268.

<sup>14e</sup> *Southern Ry. Co. v. United States*, 222 U. S. —; 32 Sup. Ct. 2; 56 L. Ed. —; affirming 164 Fed. 347. For criticism of this case, see 73 Cent. L. Jr. 423. The case follows *Delk v. St. Louis & S. F. R. Co.* 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590; reversing 158 Fed. 931; 86 C. C. A. 95; 14 A. & E. Ann. Cas.

233. See, also, *St. Louis, I. M. & S. Ry. Co. v. Hesterly*. (Ark.); 135 S. W. 874; *Patten v. Faithorn*. 152 Ill. App. 426.

In *Luken v. Lake Shore & M. S. Ry. Co.* 248 Ill. 377; 94 N. E. 175, the Supreme Court of Illinois holds that the test is whether the defective car was moving interstate commerce at the time the plaintiff was injured. This was before the decision by the Supreme Court of the United States.



a highway of interstate commerce.<sup>14f</sup> Of course, it may be shown in evidence that cars in the same train were loaded with interstate traffic, or that empty cars therein were being hauled from one state to another; or it may be shown that interstate traffic or cars were being or had been carried in other trains over the same railroad of the defendant, for the purpose of showing that such railroad line was "a highway of interstate commerce." Waybills showing the movement of interstate freight over the railroad line in question are admissible to prove the fact that the line was "a highway of interstate commerce;" and copies of such bills regularly kept in the defendant's office at the point of shipment, when properly identified, may be put in evidence, without accounting for the originals, as admissions of the charge that the railroad line was "a highway of interstate commerce;" and even a memorandum of an employee, made in the line of his duty, from the original waybills is admissible to prove that charge.<sup>14g</sup>

**§ 160. Transportation of articles of interstate commerce for an independent express company.**—If a railroad company, even though it has its lines wholly within the boundaries of a single state, accept and transport articles of interstate commerce for an independent express company,<sup>15</sup> it is engaged in interstate commerce and must equip its cars

<sup>14f</sup> This decision of the United States Supreme Court in a measure clears away the difficulty the court labored under in *Louisville & N. R. Co. v. United States*, 186 Fed. 280, and shows that the court was not exactly correct in its interpretation of the statute as set forth in the following language, viz.: "These considerations lead us to the conclusion that the amendment of 1903 was intended to be a regulation of railroads while they are engaged in interstate commerce and that the language means the same thing as if the word 'when' were interposed before the word 'en-

gaged.' And, indeed, this is not a forced construction, but is one of the natural constructions which the words actually used would bear, for 'engaged' might, with equal propriety, refer to a continuous period or to a definite time. And this would found the duty of adopting the latter definition. And so construed the statute is relieved of the objection that Congress has no power to regulate the domestic commerce of a state."

<sup>14g</sup> *Louisville & N. R. Co. v. United States*, 186 Fed. 280.

<sup>15</sup> *Wells, Fargo & Company*.

in the train with automatic couplers to escape the penalty inflicted by the act of Congress. "But although the express company," said Judge Sanborn, "was not one of the common carriers engaged in interstate commerce to which the original interstate commerce act applied,<sup>16</sup> the box of liquor it caused to be transported from Missouri to Colorado was an article of interstate commerce, its carriage was a transaction of that commerce, and the express company's participation in its transportation was engaging in interstate commerce.<sup>17</sup> Moreover, the interstate commerce act had been so amended that express companies were subject to its provisions before the transportation here in issue was conducted.<sup>18</sup> The Safety Appliance Act declares that 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad,'<sup>19</sup> 'to haul or permit to be hauled or used on its line any car' (or engines)<sup>20</sup>—except four-wheeled cars and certain logging cars<sup>21</sup>—and in moving interstate commerce traffic unequipped with couplers coupling automatically by impact,'<sup>22</sup> and that every such carrier shall be liable to a penalty of one hundred dollars for each violation of the statute. The Northwestern Company<sup>23</sup> transported the box of liquor upon its railroad from Boulder to Sunset for the express company, on its continuous passage from its origin in one state to its prescribed destination in another, and evidence was rejected upon the trial that it was a daily occurrence for this railroad to carry express matter in its cars which had been consigned from points without

<sup>16</sup> Citing *United States v. Morsman*, 42 Fed. Rep. 448; *Southern Indiana Exp. Co. v. U. S. Exp. Co.* 88 Fed. Rep. 659.

<sup>17</sup> Citing *Crutcher v. Kentucky*, 141 U. S. 47; 11 Sup. Ct. Rep. 851; 35 L. Ed. 649; reversing 89 Ky. 6; 12 S. W. Rep. 141; *Osborne v. Florida*, 164 U. S. 650; 17 Sup. Ct. Rep. 214; 41 L. Ed. 586; affirming 33 Fla. 162; 25 L. R. A. 120; 4 Interst. Com. Rep. 731; 14 So. Rep. 588; 39 Am. St. Rep. 99; *Caluwell v. North Carolina*, 187 U. S. 622; 23 Sup. Ct.

Rep. 229; 47 L. Ed. 336; reversing 127 N. C. 521; 37 S. E. Rep. 138.

<sup>18</sup> Act June 29, 1906, S. 3591, Secs. 1 and 11; 34 Stat. at L. 584, 595.

<sup>19</sup> 27 Stat. at Large, 531, Sec. 1.

<sup>20</sup> Citing *Johnson v. Southern Pac. R. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 303; reversing 54 C. C. A. 508; 117 Fed. Rep. 462.

<sup>21</sup> Citing Sec. 6 of Act.

<sup>22</sup> Citing Sec. 2 of Act.

<sup>23</sup> The defendant.

to places within the state of Colorado. That rejected evidence should have been received because it had a tendency to show that the railroad company was engaged in interstate commerce, and if the testimony had fulfilled the promise of the question propounded to elicit it, and had been uncontradicted, the fact would have been established that the company was thus engaged within the meaning of the Safety Appliance Act. The transportation by a common carrier by railroads of articles of interstate commerce for an independent express company is engaging in interstate commerce by railroad as effectually as their carriage by it for the vendors or consignors." "Our conclusion is that a common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in continuous passage from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provisions of the Safety Appliance Acts, although it carries the property free from a common control, management or arrangement with another carrier for continuous carriages or shipments of the goods."<sup>24</sup>

**§ 161. Distance defective car hauled.**—It is immaterial how short a distance the defective car is hauled; if hauled at all the railroad company is liable. This is particularly true of terminal railroads.<sup>25</sup> In fact the defective car need not be moved at all, if it is "used" in interstate commerce.<sup>25a</sup>

<sup>24</sup> United States v. Colorado, etc., R. Co. 157 Fed. Rep. 321, 342.

This Colorado railroad was certainly "a highway of interstate commerce" for it was devoted to carrying such parcels or packages within the interpretation of the Supreme Court of the United States in the recent decision explained in Sec. 159.

<sup>25</sup> United States v. Northern Pac. Terminal Co. 144 Fed. Rep. 861; United States v. Philadelphia, etc., R. Co. 160 Fed. Rep. 696; 162 Fed. Rep. 403; United States v. Chicago, etc., R. Co. 143

Fed. 353; United States v. Southern Ry. Co. 135 Fed. 122; Crawford v. New York, etc., R. Co. 10 Am. & Eng. R. Cas. 166; United States v. Pittsburg, etc., R. Co. 143 Fed. 360.

A movement of a car not exceeding twenty feet, resulting in injuring an employee, was held to be a violation of the statute. Chicago, etc., R. Co. v. King, 169 Fed. Rep. 372 (decided February 3, 1909); Donegan v. Baltimore, etc., R. Co. 165 Fed. Rep. 869.

<sup>25a</sup> See Sec. 166.

§ 162. **Switching car.**—The statute applies to a car while being used in switching movements.<sup>26</sup> Thus a car, having a defective coupler, was one belonging to the Wabash Railroad Company, and was known and designated as a foreign car. It was brought into Minneapolis, Minnesota, from Wisconsin by the Soo Railroad, delivered by it to the Great Northern Railway Company, the defendant, loaded with coal, and by the defendant delivered to the consignee. It was then unloaded and placed on a switch of the defendant for the purpose of redelivery to the Soo Railroad. It was delivered to that railroad, and afterwards loaded with shingles in Minnesota, and taken by the Soo road thus loaded into Wisconsin on its return home. While it was standing on the defendant's track, and before its delivery to the Soo road, an employee of the defendant was injured because of a defective coupling; and it was held that the car at the time was used in interstate commerce.<sup>26a</sup>

<sup>26</sup> *United States v. Pittsburg, etc., R. Co.* 143 Fed. Rep. 360; *Crawford v. New York, etc., R. Co.* 10 Am. & Eng. Neg. Cas. 166; *United States v. Northern Pacific T. Co.* 144 Fed. Rep. 861; *United States v. Pittsburg, etc., R. Co.* 143 Fed. Rep. 360; *United States v. Chicago, etc., Ry. Co.* 143 Fed. Rep. 353; *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 425. *United States v. Philadelphia, etc., Ry. Co.* 160 Fed. Rep. 696, and 162 Fed. Rep. 403; *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *Wabash R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *United States v. Southern Ry. Co.* 167 Fed. 699; Appendix G; *Johnson v. Great Northern Ry. Co.* 178 Fed. 643;

*Erie R. Co. v. Russell*, 183 Fed. 722; *Siegel v. N. Y. Central R. Co.* 178 Fed. 873; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. 423; *Patten v. Faithorn*, 152 Ill. App. 426. The rule laid down in this section is adopted by the Supreme Court. *Delk v. St. Louis & S. F. R. Co.* 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590; reversing 158 Fed. 931; 86 C. C. A. 95; 14 A. & E. Ann. Cas. 233; *Union Stock Yards v. United States*, 169 Fed. 409; *United States v. Southern Pacific Co.* Appendix G; *Mobile, J. & K. C. Co. v. Bromberg*, 141 Ala. 258; 37 So. 395.

<sup>26a</sup> *Johnson v. Great Northern Ry. Co.* 178 Fed. 643. The court relied upon *Johnson v. Southern Pacific Co.* 196 U. S. 1; 25 Sup. Ct. 158; 49 L. Ed. 363 and *Voelker v. Chicago, M. & St. P. Ry. Co.* 116 Fed. 867; same case on appeal, 129 Fed. 522; 65 C. C. A. 226; 70 L. R. A. 264.



§ 163. **Belt railroad—Terminal road.**—The statute applies to cars hauled on a belt railroad, used as a link between railroads engaged in interstate commerce.<sup>27</sup> So it applies to a terminal road, and to those delivering to and receiving cars from it.<sup>28</sup> “When, therefore, the terminal company is engaged in effecting a transfer of one of those cars from one line of railway to another, it is itself engaged in handling a car used in moving interstate traffic. Thus far there can be absolutely no evil. But what is the difference if it takes the car from one of the lines and moves it to its own team track, there to be unloaded, or moves it back empty and places it in one of the lines again to be forwarded elsewhere? In either event it handles a car used in the designated traffic. So it does with equal fault when it moves a car used for moving interstate traffic set in by one of the lines to a convenient engine upon the yard, to be unloaded of its coal designed for use by such engine. It is hauling or using a car, the particular use of which is inhibited by the statute.”<sup>29</sup> “It must be conceded that the Stockyards Company would not be a common carrier, nor the property used by it a railroad, if its operations were confined to maintaining the sheds or pens, to unloading shipments thereto, to loading shipments therefrom, and to

<sup>27</sup> *Interstate Stock Yards v. Indianapolis Union Ry. Co.* 99 Fed. Rep. 472; *United States v. Union Stock Yards Co.* 161 Fed. Rep. 919; *Belt Ry. Co. v. United States*; see Appendix G; *Belt Ry. Co. v. United States*, 168 Fed. Rep. 542 (decided February 3, 1909).

<sup>28</sup> *United States v. Chicago, etc., R. Co.* 143 Fed. Rep. 353; *United States v. Southern Pac. Co.* 154 Fed. Rep. 897; *United States v. Northern Pac. T. Co.* 144 Fed. Rep. 861.

<sup>29</sup> *United States v. Northern Pacific Terminal Co.* 144 Fed. Rep. 861; *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 423;

*United States v. Union Stock Yards Co.* 161 Fed. Rep. 919; affirmed, 169 Fed. 404; *Belt Ry. Co. v. United States*, 168 Fed. 542; see Appendix G.

“It may be questioned whether a railroad company must be a common carrier in order to bring it within these acts, since the amendment approved March 2, 1903, makes the provisions and requirements of that amendatory act, as well as of the original, apply to all ‘cars and similar vehicles used on any railroad engaged in interstate commerce.’” *United States v. Union etc., Co.* 161 Fed. Rep. 919.



feeding, watering, caring for, and otherwise handling live stock therein. But its operations are not thus confined. On the contrary, they include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from sheds or pens, which, in effect, are the depot of the railroad company for the delivery and shipment of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens, and *vice versa*, is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. \* \* \* In those circumstances controlling decisions leave no room to doubt that it is a common carrier engaged in interstate commerce by railroads within the meaning of the Safety Appliance Law." <sup>29a</sup>

§ 164. **Car on spur track.**—In a case in Alabama the evidence showed that the defendant operated a railroad running between Birmingham of that state and Memphis in the state of Tennessee. The plaintiff was in its employ and service at the time he received his injuries as brakeman, and was injured while in the act of coupling a car to a switch engine on a spur track a mile from the main track, this spur track joining the main track at Carbon Hill, a station of the defendant. At the time of the injury the car was being switched on the spur at a coal mine preparatory to being carried to Carbon Hill by defendant's switch engine in charge of its employes, to be then shipped over its main line. The switch engine never went further than Carbon Hill, and was used for no other purpose than switching, not being used on the main line, but being used merely for carrying cars to the station from the mines, and then placing the cars on a special siding at the station, Carbon Hill, from which they were taken by regular trains to the point of destination

<sup>29a</sup> United States v. Union Stock Yards Co., 169 Fed. 404.

After the car had been loaded at the mines and put on the storage track or special siding at Carbon Hill, it was thereafter billed and shipped from Carbon Hill to Aberdeen, Mississippi, by the company owning the coal mines. Sometimes, also, cars were billed from the mines. There was nothing to show that any instructions whatever had been given by the shipper before the car reached Carbon Hill as to its destination or intended destination; but after being placed on the storage track at Carbon Hill it was picked up by a regular train and carried to Aberdeen. So far as the evidence showed, the car at the time of the accident, while still at the mines, might have been intended for shipment by the mine owner to some point within the state. Upon these facts the court refused to disturb the verdict of the jury to the effect that the car was engaged in interstate commerce at the time the defendant was injured by a defective coupling on the car.<sup>30</sup>

§ 165. "Used in moving interstate traffic"—**Sending car to repair shop—Making up train.**—The phrase "used in moving interstate traffic" does not mean that a car must be actually loaded and on its journey from one state to another in order to be within the provisions of the statute; but only that it has been intended and is intended to be so used whenever required; and it is a violation of the statute to move such a car, if not equipped with automatic brakes, from one state to another as a part of a train, although it is empty at the time; nor is the mere fact that it is destined for a repair shop a defense.<sup>31</sup> The statute applies to making

<sup>30</sup> *Kansas City, etc., R. Co. v. Hippo*, 138 Ala. 487; 35 So. Rep. 457; *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 423.

Under the recent decision of the Supreme Court of the United States this decision is correct in its general result. See Sec. 159.

<sup>31</sup> *United States v. St. Louis, etc., R. Co.* 154 Fed. Rep. 516; *United States v. Great Northern*

*Ry. Co.* 145 Fed. Rep. 438; *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *United States v. Philadelphia, etc., R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408 (see Appendix G); *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405 (see Appendix G); *United States v.*

up the train for the purpose of moving interstate traffic.<sup>32</sup> And so it applies to a dining car standing on a side track waiting to be hitched onto its regular train.<sup>33</sup>

§ 166. **Hauling car not essential to commission of offense**—**Use of car.**—If a car is *used* in interstate commerce the statute is violated, and it is not necessary that it be *hauled* to constitute its violation. “In section two it is the hauling or *using* of the car that is condemned. In section four it is the *using* alone that is condemned. The former section reads, it shall be unlawful to ‘haul or permit to be hauled or used,’ etc.; the latter reads, it shall be unlawful for any railroad ‘to use any car,’ etc. The penalty is imposed in section six, when the car is ‘hauled or used.’ Is the defendant’s contention true, that a hauling is absolutely necessary to complete the offense? The statute forbids hauling and using. Why are both words used? If the car was fully loaded and on the track ready to be started as a part of an interstate train, with the engine attached and fired, and requiring only the touch of the engineer to start, would not the car be ‘used’ or in use, within the statute, before it was hauled? If it were without an automatic coupler, so that the brakeman would have to go between the cars to couple them, it would clearly be within the mischief the statute was intended to prevent. ‘Used’ has other meanings than ‘hauled.’ It is a broader word.”<sup>33a</sup> In another case it was said “After the coupler became defective, and could not be coupled without going between the ends of

Lehigh Valley R. Co. 162 Fed. Rep. 410 (see 160 Fed. 696: Appendix G); United States v. Louisville, etc., R. Co. 162 Fed. Rep. 185. But as to hauling to a repair shop, see now Sec. 206. But not under the Massachusetts state statute. Taylor v. Boston, etc., R. Co. 188 Mass. 390; 74 N. E. Rep. 591.

<sup>32</sup> Mobile, etc., R. Co. v. Brom-

berg. 141 Ala. 258; 37 So. Rep. 395; United States v. Northern Pacific T. Co. 144 Fed. Rep. 861.

<sup>33</sup> Johnson v. Southern Pac. Ry. Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 117 Fed. Rep. 462; 54 C. C. A. 508; Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423.

<sup>33a</sup> United States v. St. Louis S. W. Ry. Co. Appendix G.

the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, *or used* on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further.”<sup>33b</sup>

§ 167. **Car not used in interstate commerce.**—Of course, a car not used in interstate commerce does not come within the provisions of the statute; but if it is hauled in an interstate train of cars it does; because the danger to employes engaged in transportation of interstate traffic—whom it was the design of Congress to protect—is just as imminent as if the car was used in interstate commerce.<sup>34</sup> And so the same is true if it be hauled over a railroad devoted as a highway of interstate commerce.<sup>34a</sup>

§ 168. **Interstate car in “connection” with intrastate car.**—Under the recent decision of the Supreme Court of the United States<sup>34a</sup> it is now immaterial whether the car out of repair was or was not used in immediate “connection” with an interstate car. The amendment of 1903 provides that the Act of 1893 “shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce” “and to all other locomotives, tenders, cars and similar vehicles used *in connection* therewith.” Before the decision of the Supreme Court above referred to, in a case in the Sixth District it appeared that “Near to the forward end of it was a car loaded with freight, some of which was consigned to a point or points” in another state. It was “not charged

<sup>33b</sup> St. Louis & S. F. Ry. Co. v. Delk, 158 Fed. 931; 86 C. C. A. 95; 14 A. & E. Ann. Cas. 233; reversed in Delk v. St. Louis & S. F. R. Co. 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590 but not on this point which was expressly approved by the Supreme Court. United States v. Southern Pacific Co. Appendix G.

<sup>34</sup> Winkler v. Philadelphia, etc., R. Co. 4 Penn. (Del.) 387; 53

Atl. Rep. 90; Elgin, etc., R. Co. v. United States, 168 Fed. Rep. 1 (decided February 3, 1909); United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775.

Congress has no power to regulate the use of cars not employed in interstate commerce, and the Safety Appliance Act cannot be so construed. United States v. Erie R. Co. 166 Fed. Rep. 352.

<sup>34a</sup> See Sec. 159.



that this car was not equipped with the proper couplings and handholds. Toward the rear end of the train were the four freight cars in question, not alleged to be carrying interstate freight, which were not equipped with the required couplings as to the two cars, nor with proper handholds as to the other two. Between these and the car carrying interstate freight were other cars not alleged to be carrying interstate freight and not alleged to be without the required couplings or handholds." As the cars out of repair were not alleged to be in interstate commerce they were considered to be intrastate cars; and as there was a car not alleged to be out of repair between them and the interstate car, it was considered that such car must also be regarded as an intrastate car; and, therefore, as there was an intrastate car, not out of repair, between the interstate car and the intrastate car out of repair (and which was the basis of the action on the part of the government), it was claimed that such out-of-repair cars were not "used in connection" with the interstate car, it being argued "that the 'connection' of the car carrying interstate freight which the act intends is an *immediate* connection with the cars not properly equipped." But the court, although admitting "there was some ground for argument that the law should have such restricted operation," because of its penal character, considered that "the trend of decisions of circuit courts and the circuit courts of appeal had been the other way, and is to the effect that the connection of the cars in the trains is not required to be immediate, and we are not so far convinced that those decisions are wrong as to justify us in holding to the contrary."<sup>34b</sup> Exactly the opposite had been held in the Seventh Circuit.<sup>34c</sup> Of course, as we have above stated, these cases need not now, upon this point, be considered.<sup>34d</sup>

<sup>34b</sup> Louisville & N. R. Co. v. United States, 186 Fed. 280.

<sup>34c</sup> United States v. Illinois Central R. Co. 166 Fed. 997.

<sup>34d</sup> See United States v. International & G. N. R. Co. 174 Fed. 638; Wabash R. Co. v. United States, 168 Fed. 1; Chicago Junc-

tion Ry. Co. v. King, 169 Fed. 372; Chicago & N. W. Ry. Co. v. United States, 168 Fed. 236; United States v. Southern Pacific, 169 Fed. 407; United States v. Chicago & N. W. Ry. Co. 157 Fed. 616; United States v. Chicago G. W. Ry. Co. 162 Fed. 775; United



§ 132. **Use of car in interstate commerce.**—Since the mere use of an improperly equipped car in interstate commerce is an offense under the Federal Safety Appliance Act, the inquiry naturally arises “What is the use that the statute forbids?” Of course, if a car is loaded with interstate traffic and hauled in a train of cars it is “used.” If it is empty and hauled in an interstate train it is also in “use”; for an offense is committed. Under the recent decision of the Supreme Court of the United States <sup>34d</sup> whether loaded or unloaded, even if it be an intrastate car hauled in an intrastate train, yet if it be hauled over a railroad that is “a highway of interstate commerce” it is an offense whether we regard it as either hauled or “used.” Under the decision cited in the next previous section <sup>34e</sup> if the car be merely loaded with interstate traffic it is “used” in interstate commerce; and applying the reasoning of the Supreme Court above referred to <sup>34d</sup> it would seem that if it be merely loaded for removal with intrastate commerce it is “used” within the prohibition of the statute; indeed, combining that decision with the decision concerning empty cars, it would seem to be a logical result of their trend that an empty intrastate car designed or intended to be hauled on a railroad which is “a highway of interstate commerce” is also “used” within the prohibition of the statute. But it is readily seen that here we are treading upon dangerous ground and practically losing sight of those instances wholly under the control of a state. At this point courts are bound, in all likelihood, to differ, and only the commanding decision of the Federal Supreme Court can settle the question.<sup>34g</sup>

States v. Chesapeake & O. Ry. Co. Appendix G; United States v. Southern Pacific Co. 167 Fed. 699; United States v. Southern Ry. Co. Appendix G; United States v. Toledo Terminal R. Co. Appendix G; United States v. Southern Pacific Co. Appendix G.

<sup>34e</sup>Section 165.

<sup>34d</sup>Section 159.

<sup>34g</sup>It may be noted that in a number of the more recent decisions the word “commercial” is occasionally applied to the cars drawn in question in the cases wherein such decisions are ren-

§ 170. **Temporary suspension of transportation.**—The temporary suspension of the transportation of a car does not take it out of the statute. “Whether that [the ultimate destination] was nearby or remote is not material, because the shipment had originated in another state and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased.”<sup>35</sup>

§ 171. **Permitting cars to be hauled over its lines.**—It is immaterial not only what company owns the cars but it is also immaterial what company hauls so far as the company owning the line over which they are hauled commits an offense. Merely permitting cars improperly equipped to be hauled by another company over its line of railroad is an offense in the company owning the railroad and permitting the hauling to be done. “It does not matter whether the defendant was the owner or not, because the statute prohibits the use on the line of the road or the permitting to be hauled on the line of the road, any of these cars not equipped as the statute provides. So that if they permitted to be hauled or used on their roads any such cars, even though they belonged to other companies, they would offend against this provision of the statute.”<sup>36</sup>

dered, as “commercial use.” Whether or not courts will seize upon the word “commercial” and apply it in an interpretation of the word “used” is not to be foretold. Touching the use of the word “commercial,” see *Southern Ry. Co. v. Snyder*, 187 Fed. 492; *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. 236; *United States v. Southern Pacific Co.*, 169 Fed. 407.

<sup>35</sup> *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 35 C. C. A. 65; 70 L. R. A. 264; *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 423.

<sup>36</sup> *Crawford v. New York, etc., R. Co.* 10 Am. & Eng. Neg. Cas.

166; *United States v. Chicago, M. & St. P. Ry. Co.* 149 Fed. 486. The receiving company must ascertain at its peril that each car it receives from another railroad company is properly equipped with safety appliances. *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v. Southern Pac. Co.* (see Appendix G; 167 Fed. 699). What is the receipt of a car, see *Chicago, etc., R. Co. v. United States*, 165 Fed. Rep. 423.

Section 2 makes it unlawful for a railroad company to “haul or permit to be hauled or used” a defective car “on its line.” St.

§ 172. **Defendant hauling car over another company's line of railway.**—The statute makes it an offense for any railway company to run or haul or permit to be hauled or used "on its line" any car in violation of its provisions; and the question has been presented whether an interstate commerce railway company hauling its train of cars over another company's line of railroad track incurred the penalty of the statute. In one case the charge was that the defendant hauled a defective car "over its line of railroad" from one place in New Jersey to another in Pennsylvania. The defendant had an agreement with another railroad company by which it was enabled to haul its trains over such other company's tracks between the two points designated, but subject to the rules of such other company. The defendant was held liable, the court saying: "The fact that in conducting its train over these tracks the defendant company did so, subject to such rules and regulations of the other company as were necessary for the safe and convenient conduct of its business, in nowise militates against the proposition that the defendant company had a legal right to the use of these tracks, and that during such use they were properly the line of the defendant company, within the meaning of the 'Safety Appliance Act.' It was therefore in violation of the act that it allowed the car in question to be hauled in its own train, in the control of its own employees, over a line upon which it had a legal right to conduct its interstate traffic. Such contracts are not unusual, since we find cases in the books arising out of litigation concerning such agreements. The fact, if it be a fact, that in this case the inspection of the cars was made by the servants of the Central Railroad of New Jersey, cannot relieve the defendant from the liability imposed by the

Louis S. & F. R. Co. v. Delk, 158 Fed. 931; 86 C. C. A. 95; 14 A. & E. Ann. Cas. 233. This point was approved, although the

case was reversed, by the Supreme Court. Delk v. St. Louis, S. & F. R. Co. 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590.

act. It can not by contract dispense with any care required of it by law, and the most that could be said of such a situation would be that it had voluntarily made the inspectors of the other company its own.” <sup>37a</sup>

**§ 173. Freight designed for another state—Not yet left the first state.**—It matters not that the freight designed for another state has not yet left the state from which it is intended for such other state, if it has been placed aboard the cars ready for transportation to such other state. In one case the following language was used: “It has been proven in this case \* \* \* that both of the cars in question were carrying traffic consigned from a point in one state to a point in another state. This makes such traffic interstate commerce. While the evidence does not show that the defendant hauled the car across the state line, still the defendant is engaged in interstate traffic no matter how short the movement, if the traffic hauled is in course of movement from a point in one state to a point in another.” <sup>37</sup>

**§ 174. Intrastate traffic—Narrow gauge railroad wholly within state.**—A company owned and operated a narrow gauge road that lay wholly within the state of Ohio, and was about one hundred miles long, terminating at Bellaire on the Ohio river. At Bellaire it connected with the Baltimore & Ohio Railroad in the sense that it received from that railroad freight from other states marked for points on its line, and delivered to it freight from points on its own line marked for other states in the following manner: There

<sup>37</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893; *United States v. Northern, etc., Ry. Co.* 144 Fed. Rep. 861; *United States v. St. Louis, etc., R. Co.* 154 Fed. Rep. 516. It must be apparent to the reader that the

particular phase of the question discussed in this section is now academic in view of the recent decision of the United States Supreme Court. See Sec. 159.

<sup>37a</sup> *Philadelphia & R. Ry. Co. v. United States*, 191 Fed. 1.



was no interchange of cars because of the different gauges of the two roads, the defendant's cars being used only on its own road. A transfer track ran from its terminal station to the Baltimore and Ohio road, so the freight cars of the two roads could be placed alongside of adjoining platform, and the transfer of freight made from the cars of one road to those of the other. Neither road issued through bills of lading for the freight transferred; and no through rate for freight was fixed by mutual arrangement, nor was there a division of freight charges for through freight carried by both roads. Freight transported to Bellaire by the narrow gauge road and marked for a point in another state was delivered to the agents of the Baltimore and Ohio with an expense or transfer bill that stated the original point of the shipment, the consignee and place of consignment, and the freight charges of the delivering road. The usual way-bills accompanied this traffic. On taking charge of freight thus delivered to it, the Baltimore and Ohio assumed the payment of the narrow gauge road's freight charges, and collected the entire charges of the transportation on delivering the freight at its destination. Incoming freight was handled in the same manner, except that the agents of the Baltimore and Ohio at Bellaire would bring the traffic to and put it in cars of the narrow gauge road. When it received freight with the expense or transfer bill, the narrow gauge road would assume the charges of the other road, and collect the entire freight charges at its destination. There were weekly settlements between the two roads of freight charges, and balances paid when found due; but each road became responsible for the freight charges of the other, whether the consignee paid them or not. Such transfers occurred daily, and each company's charges were in accordance with its own rates. The acts upon which the suit was based were hauling in a car not equipped as the act of Congress required, cases of eggs destined for a point in Pennsylvania and delivered at Bellaire to the Baltimore and



Ohio for shipment to the point of destination; and also the hauling of certain freight in cars not properly equipped from Bellaire to a station over the narrow gauge road, which freight had been shipped from Philadelphia, in Pennsylvania, and consigned to a point on the latter road. It did not appear there was any through bill of lading; but the form of the bill of lading used by the defendant, the narrow gauge road, provided as follows: "This blank must in no case be filled with the name of any station or place beyond the line of this company's road." Upon these facts it was held that the car carrying the eggs and those carrying the freight from Philadelphia were not used in interstate commerce, and so need not be equipped with automatic brakes.<sup>38</sup>

**§ 175. Intrastate railroad engaged in carrying interstate commerce articles.**—This statute has been held to apply to a railroad company operating wholly within a state, independently of all other carriers, but which receives and transports to their destination articles, in a continuous trip, brought from another state. Thus, a narrow gauge railroad was operated wholly within the state of Colorado. A shipment of hardware was carried by an interstate wide gauge railroad from Omaha, Nebraska, to a station on this narrow gauge road and delivered to it for carriage to a station on the main line a few miles farther on, to which place it had been consigned from Omaha. This shipment was not carried upon a through bill of lading, but it was consigned

<sup>38</sup> United States v. Geddes, 131 Fed. Rep. 452; 65 C. C. A. 320. See also United States v. Chicago, etc., R. Co. 81 Fed. Rep. 783, and Interstate Commerce Commission v. Bellaire, etc., R. Co. 77 Fed. Rep. 942. At a latter date the same result was reached in another case against the same railroad company upon exactly similar facts. United

States v. Geddes, 180 Fed. 480. In this case the court distinguishes it from the case of Cincinnati, N. O. & T. P. Ry. Co. v. Inter. Com. Commission, 162 U. S. 193; 16 Sup. Ct. 700; 40 L. Ed. 935.

The case of United States v. Geddes, *supra*, is discussed and denied in Sec. 176.

and carried upon a continuous passage from the point of origin to its destination at the station of the narrow gauge. The shipment was re-billed by the narrow gauge road from the point it received it to its place of destination on its line, and it advanced the freight charges for the previous transportation, collecting them of the consignee on delivering the goods. The broad gauge and narrow gauge roads, at their point of contact, had a platform for their common use, for the purpose of receiving goods on one side of it and loading on the other, in this way making an exchange of goods carried by them respectively. It was held that this narrow gauge road was subject to the federal statute and must equip its cars with automatic brakes. Judge Sanborn relied upon the celebrated case of *The Daniel Ball*.<sup>39</sup> That was a case to recover a penalty in a suit brought by the United States for navigating Grand river in the state of Michigan without a license. The defense was that the boat was not engaged in trade or commerce between two or more states, but was employed solely in intrastate commerce. It was agreed that the vessel was operated entirely within the state of Michigan between Grand Rapids and Grand Haven, and that it did not run in connection with, or in continuation of, any line of steamers or vessels on the lake, or any line of railway in the state, but that it was a common carrier between these two cities, and "that some of the goods that she shipped to Grand Rapids and carried to Grand Haven were destined and marked for places in other states than Michigan, and that some of the goods which she shipped at Grand Haven came from other states and were destined for places within that state." Judge Sanborn, from this question, reached the conclusion that "the power to regulate interstate commerce is as complete upon the land as upon the navigable waters of the nation, and congressional regulation

<sup>39</sup> 10 Wall. 557; 19 L. Ed. 999; reversing *Brown, Admr.*, Cas. 193; Fed. Cas. No. 3564.

upon the former must be interpreted by the same rules and enforced with the same efficiency as like regulations upon the latter.<sup>40</sup> The plain and specific declaration of the acts of Congress before us, which have been recited,<sup>41</sup> and the familiar rule that where the terms of a statute are unambiguous and their meaning is plain there is no room for construction, and the apt and controlling opinion of the Supreme Court in the *Daniel Ball* case<sup>42</sup> which decided, in a case strictly analogous, the material legal questions in this case, urgently persuade that the Northwestern Company<sup>43</sup> was a common carrier engaged in interstate commerce by railroad within the meaning of the Safety Appliance Acts, and was thereby required to equip its cars with automatic couplers."<sup>44</sup> Nor can a railroad urge that it hauled the car the distance it did in order to reach its general repair shops, if it could have repaired the car at nearby points.<sup>45</sup>

§ 176. **United States against Geddes denied.**—In the case of the United States against Colorado and Northwestern

<sup>40</sup> Citing *In re Debs*, 158 U. S. 564; 15 Sup. Ct. Rep. 500; 39 L. Ed. 1092.

<sup>41</sup> Safety Appliance Act, p. 264.

<sup>42</sup> 10 Wall. 557.

<sup>43</sup> The narrow gauge railroad.

<sup>44</sup> *United States v. Colorado, etc.*, R. Co. 157 Fed. Rep. 321; *United States v. Colorado, etc.*, R. Co. 157 Fed. Rep. 342.

<sup>45</sup> *United States v. Chicago, etc.*, Ry. Co. 149 Fed. Rep. 486. See also *Pacific Coast Ry. Co. v. United States*, 173 Fed. 448.

A shipment from a point without the State of California was consigned to San Jose in that state. Before the shipment reached the state, and while in transit, the consignor, by agreement with one of the carriers, changed the desti-

nation from San Jose to Careaga. It was held that the traffic being carried from San Jose to Careaga was interstate. *United States v. Pacific Ry. Co.* (see Appendix G).

The statute applies to a railroad in South Carolina authorized by its special charter to "farm out" the rights of transportation. *Harden v. North Carolina R. Co.* 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784.

Under the Massachusetts statute, a car en route to a repair shop does not come within the statute prohibiting the "moving of traffic" in cars not equipped with automatic couplers. *Taylor v. Boston, etc.*, R. Co. 188 Mass. 390; 74 N. E. Rep. 591.

Railroad Company.<sup>46</sup> Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit examines at length the case of the United States against Geddes<sup>47</sup> of the Circuit Court of Appeals of the Sixth Circuit and declines to follow it. We set out the review of that case to the full extent as made by Judge Sanborn, viz: "The argument of counsel for the company, in support of the construction adopted by the Court of Appeals of the Sixth Circuit, is (1) that the part of the first section of the 'interstate commerce act' quoted above, constituted a new and exclusive definition of carriers engaged in interstate commerce; (2) that Mr. Justice Shiras in *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*,<sup>48</sup> in speaking of this act, said: 'It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting that wholly within a state) as well that between the states and territories as that going to or coming from foreign countries'; (3) that if that statement was accurate, then to be a 'common carrier engaged in interstate commerce by railroad' within the meaning of the Safety Appliance Act of 1893, which was enacted six years later, a railroad must be 'engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management or arrangement for a continuous carriage or shipment' from one state to another; (4) that Congress sought to regulate interstate commerce by each act and that having defined interstate commerce in the first act, the words 'any common carrier engaged in interstate commerce' in the subsequent Safety Appliance Acts were restricted to those carriers specified in that definition, and included only such as were so engaged with others under a common control, man-

<sup>46</sup> 157 Fed. Rep. 321.

<sup>47</sup> 131 Fed. Rep. 452; 65 C. C. A. 320.

<sup>48</sup> *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*,

162 U. S. 197, at p. 212; 16 Sup. Ct. 666, at p. 672 (40 L. Ed. 940); reversing 4 Inter. St. Com. Rep. 408; 6 C. C. A. 653; 20 U. S. App. 1; 57 Fed. Rep. 948.

agement or arrangement for a continuous passage or shipment; and (5) that any other construction would compel railroad companies operating in single states, to which articles of interstate commerce that they might not lawfully refuse to carry were tendered for transportation, to comply with the Safety Appliance Acts, and would thereby draw all commerce under national regulation. A careful study of this argument in all its branches has brought to mind some reasons why it is not convincing, which will be briefly stated. The major premise of the argument is that Congress by the act of 1887, made an authoritative definition of carriers engaged in interstate commerce by railroad and partly by railroad and partly by water, to which subsequent legislation and decision is subject; that after the passage of that act no carrier by railroad and no carrier partly by railroad and partly by water, who conducted within a single state a part of the continuous transportation of articles of interstate commerce, was engaged in that commerce, unless it conducted that carriage with some other carrier under a common control, management or arrangement for a continuous carriage or shipment. Is this the true construction and effect of the first section of the interstate commerce act of 1887? When Congress passed that statute, conclusive decisions and universal assent had established the rule of law that common carriers engaged entirely within a single state in the transportation of articles of interstate commerce included two classes: (a) Those who conducted that transportation with another or other carriers under a common control, management or arrangement for a continuous carriage or shipment; and (b) those who conducted such transportation alone, or with other carriers without any common control, management or arrangement for such a carriage or shipment. The question whether or not carriers of the second class were engaged in interstate commerce was settled.<sup>49</sup> It was not acute, debatable or open, and the purpose of the

<sup>49</sup> The *Daniel Ball*, 10 Wall. Brown, Admr., Cas. 193; Fed. Cas. 55 565; 19 L. Ed. 999; reversing No. 3,564.



act of 1887 was not to answer it. If it had been the intention of Congress and the meaning of that act that the established rule of law upon that question should be abrogated, that a new definition of carriers engaged in interstate commerce should be made which would imperatively exclude the second class from interstate commerce, it is reasonable to believe that the law making body would have made this purpose to cause so radical a departure from the law of the land clear and indisputable by a direct declaration and enactment which could easily have been written in a few lines, that henceforth carriers engaged in interstate commerce by railroad should include those of the first class only, or that they should exclude those of the second class. But the act contains no such declaration or provision. On the other hand, in the face of the established rule of law that carriers by railroad engaged in interstate commerce consisted of both classes, the Congress enacted that 'the provisions of this act shall apply to' the members of the first class, and there it stopped and enacted nothing more pertinent to this issue. The existence of the two well known classes of carriers engaged in interstate commerce, the absence of any declaration or enactment that the rule which included the members of both classes among such carriers should be abrogated or in any way modified, and the simple declaration of the act that its provisions should apply to the members of the first class without more upon this subject, render it difficult to believe that the purpose or effect of the first section of this statute was any other than to select out of all the carriers engaged in interstate commerce by railroad or partly by railroad and partly by water, and to specify, as its clear and certain words purport to do, the class of those carriers to which its provisions apply. The remark of Mr. Justice Shiras in *Texas and Pacific Ry. Co. v. Interstate Commerce Commission*,<sup>50</sup> with reference to the interstate commerce act, that 'It would be difficult to use

<sup>50</sup> 162 U. S. 212; 16 Sup. Ct. 672 (40 L. Ed. 940).

language more unmistakably signifying that Congress had in view the whole field of commerce, excepting commerce wholly within a state,' is not persuasive upon the legal issue before us (a) because this question was not presented, discussed, or decided in that case, wherein the court was considering only the relation of the circumstances, conditions and rates of transportation of foreign commerce to the circumstances, conditions and rates of transportation of interstate commerce under the act of 1887, and expressions in the opinion of courts are not authoritative beyond the questions which they were considering and deciding when they used them.<sup>51</sup> (b) Because the statement that Congress had in view the whole field of interstate commerce when it passed this act is far from an assertion, and could never have been intended to be a declaration that Congress had regulated, or had intended by that act to regulate, every carrier engaged in interstate commerce within its regulating power, for that was obviously not the fact. It did not regulate and evidently did not intend to regulate carriers engaged in the transportation of subjects of interstate commerce by stage coach, by wagon, entirely by water, or such carriers partly by water and partly by railroad, when they were not operating with other carriers under a common control, management or arrangement; (c) because the statute expressly declared that the provisions of the act should apply to the members of a specific class of carriers engaged in interstate commerce, and omitted, and thereby excluded from subjection to its provisions, those of other classes. The amendatory act of June 29, 1906,<sup>52</sup> is a demonstration that the original act was not intended to and did not regulate all common carriers engaged in interstate commerce by railroad within the power of Congress, for the amendment applies the provisions of the act to common carriers engaged in interstate commerce wholly by railroad who are exempt from

<sup>51</sup> *Cohens v. Virginia*, 6 Wheaton, 264, 299; 5 L. Ed. 257.

<sup>52</sup> 34 Stat. 584, c. 3591, Sec. 1 (U. S. Comp. St. Supp. 1907, p. 892).

any common control, management or arrangement with other carriers, and applies its provisions to many other carriers not subject to the terms of the original act. The rule in *pari materia*, which counsel for the company invoke, the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable to the interstate commerce act and the Safety Appliance Acts, because the provision of the latter relative to the question before us, is plain and explicit, and a statute falls under that rule only when its terms are ambiguous or its significance is doubtful.<sup>53</sup> and because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different. It is true that each act was a regulation of interstate commerce, but so are the Sherman anti-trust act, the employers' liability act, the various acts regulating the inspection of steamboats, and the navigation of the inland rivers, lakes and bays, and many other acts, too numerous to mention or review. It does not follow from the facts that the interstate commerce act was first passed, and that it regulates commerce among the states, and declares that its provisions shall apply to the members of a certain class of carriers engaged therein, that the Sherman anti-trust act, the Safety Appliance Acts, and other subsequent acts regulating commerce apply to the members of that class only, in the face of the positive declarations of the later acts that they shall govern other parties and other branches of commerce. The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the Safety Appliance Acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy

<sup>53</sup> Endlich on Interpretation of Statutes, Sec. 53 p. 67.

for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their construction. The contention that if a railroad company conducting the transportation of articles of interstate commerce entirely within a single state and independent of other carriers, is held to be subject to the Safety Appliance Acts, it must receive articles of interstate commerce *for* transportation, and all carriage, both interstate and intrastate, will thus become subject to national regulation, neither terrifies nor convinces. The constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually. The people of the United States carved out of their sovereign power, reserved from the states, and granted to the Congress of the United States exclusive and plenary power to regulate commerce among the states and with foreign nations. That power is not subordinate, but it is paramount to all the powers of the states. If its independent and lawful exercise of this congressional power and the attempted exercise by a state of any of its powers impinge or conflict, the former must prevail and the latter must give way. The constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land. 'That which is not supreme must yield to that which is supreme.'<sup>54</sup> It was the evident and declared purpose of the

<sup>54</sup> *Brown v. Maryland*, 12 Wheat. 419, 448; *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210; 6 L. Ed. 678; *Gibbons* 6 L. Ed. 23; *Gulf, Colorado, etc.*,

Safety Appliance Acts to require every common carrier engaged in interstate commerce, and hence every common carrier so engaged independently in a single state, to comply with the requirements of the statute. No greater burden is thereby imposed upon a company engaged in such commerce within one state than upon one so engaged in more than one state. There was as urgent a demand, and as much reason and necessity, for the protection of the lives and limbs of the servants of railroad companies operating in a single state, as of preserving the lives and limbs of the servants of such companies operating across state lines. The Safety Appliance Acts might be practically evaded and thus rendered futile if companies independently transporting articles of interstate commerce in single states could exempt themselves from their provisions by conducting all such transportation, except that across the imaginary lines which divide the states, by means of corporations operating in single states only, and finally the objection here under consideration was determined to be untenable by the controlling opinion of the Supreme Court in the *Daniel Ball* case,<sup>55</sup> where it was equally available, was considered and overruled, for Congress has the

Ry. Co. v. Hefley, 158 U. S. 98; 15 Sup. Ct. 802; 39 L. Ed. 910; Int. State Commerce Com. v. Detroit, etc., Ry. Co. 167 U. S. 633, 642; 17 Sup. Ct. 986; 42 L. Ed. 306; State Freight Tax Case, 15 Wall. 232, 275, 280; 21 L. Ed. 146; Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 8; 24 L. Ed. 708; Chy Lung v. Freeman, 92 U. S. 275, 280; 23 L. Ed. 550; Ry. Co. v. Husen, 95 U. S. 465, 471, 472, 473; 24 L. Ed. 527; Hall v. De Cuir, 95 U. S. 485, 488-490, 497, 498-513; U. S. 485, 488-490, 497, 498-513; 24 L. Ed. 547; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 736, 737; 5 Sup. Ct. 739; 28 L. Ed. 1137; Bowman v. Chicago, etc., Ry. Co.

125 U. S. 465, 479, 480, 481, 484, 485, 488, 489, 490, 491, 507, 508; 8 Sup. Ct. 689, 1062; 31 L. Ed. 700; Welton v. Missouri, 91 U. S. 275, 280; 23 L. Ed. 347; Lyng v. Michigan, 135 U. S. 161, 166; 10 Sup. Ct. 725; 34 L. Ed. 150; Norfolk, etc., Ry. Co. v. Pennsylvania, 136 U. S. 114, 115, 118, 120; 10 Sup. Ct. 958; 34 L. Ed. 394; Crutcher v. Kentucky, 141 U. S. 47, 57, 58, 59; 11 Sup. Ct. 851; 35 L. Ed. 649; Osborne v. Florida, 164 U. S. 650, 655; 17 Sup. Ct. 214; 41 L. Ed. 586; Caldwell v. North Carolina, 187 U. S. 622, 623; 23 Sup. Ct. 229; 47 L. Ed. 336.

<sup>55</sup> 10 Wall. 565; 19 L. Ed. 999.



same 'fulness of control' over interstate commerce carried upon railroads and other artificial highways upon the land that it has over that borne upon the navigable waters of the nation.<sup>56</sup> Some of the reasons why the argument of counsel in support of the construction of these acts which they seek, has not proved convincing, have now been stated. There are, however, other and controlling considerations which deter us from the conclusion they urge. Congress enacted that 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad' to haul any car on its line, used in moving interstate traffic, unequipped with automatic couplers, except four-wheeled cars and certain logging cars and the engines which draw them. The construction of this enactment sought in effect amends this positive declaration by importing into it the exception which appears in italics below, so that it would read, 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad, \* \* \* *except a common carrier engaged in interstate commerce by railroad wholly within a single state and not under a common control, management or arrangement with any other carrier for a continuous carriage or shipment*' to haul any car on its line used in moving interstate traffic unequipped with automatic couplers, except four-wheeled cars and certain logging cars and the engines used to haul them. But where the Congress makes no exception from the clear and certain declaration of a statute, there is ordinarily a presumption that it intended to make none.<sup>57</sup> By so much the more is it true that where the lawmaking body has made exceptions to the general terms of an act, as in this instance, the presumption is that it intended to make no more. Again, if Congress intended to make this exception, it was a secret intention which the Safety Appliance Acts not only failed to

<sup>56</sup> *In re Debs*, 158 U. S. 590, 591; 15 Sup. Ct. 900; 39 L. Ed. 1092.

<sup>57</sup> *McIver v. Ragan*, 2 Wheat. 25, 29; 4 L. Ed. 175; *Bank v. Dalton*, 9 How. 522, 528; 13 L.

Ed. 242; *Vance v. Vance*, 108 U. S. 514, 521; 2 Sup. Ct. 854; 27 L. Ed. 808; *Railway Co. v. B'Shears*, 59 Ark. 237, 244; 27 S. W. 2.

express, but which their terms expressly negatived. It is the intention expressed, or necessarily implied, in the law, and that alone, to which courts may lawfully give effect. They may not assume or presume purposes and intentions that are neither expressed or implied, and then construe into the law the provisions to accomplish these assumed intentions. A secret intention of the lawmaking body cannot be legally interpreted into a statute which is plain and unambiguous, and which does not express or imply it.<sup>58</sup> The principal reasons which have been persuasive in the determination of the question in hand have now been stated. They have been presented at considerable length in deference to the opinion of the Court of Appeals of the Sixth Circuit in the Geddes case, which it would have been a pleasure to follow, if the proper result had been doubtful in our opinion. But this case has been presented to this court for decision. The exercise of its independent judgment has been invoked, and it may not be lawfully denied. The positive and explicit declaration of the first section of the Safety Appliance Act of 1893 that 'it shall be unlawful for any common carrier engaged in interstate commerce by railroad' to use any cars unequipped with automatic couplers except four-wheeled cars and logging cars in moving interstate traffic, the clearness and certainty of this language which prohibits interpretation, the absence of any expression of the exception which the court is asked to import into this statute, the presumption from the plain language of the law that the Congress intended to make no such exception, the rule that the courts may not insert in a statute an enactment of an assumed secret intention of the lawmaking body which is not expressed therein or necessarily implied, the fact that the interstate commerce act does not appear to us to define common carriers engaged in interstate commerce by railroad, but simply to apply the provisions of that act to

<sup>58</sup>U. S. v. Wiltberger, 5 Wheat. 95 Am. Dec. 152; Smith v. State, 76: 5 L. Ed. 37; Bennett v. 66 Md. 215; 7 Atl. 49; Railway Worthington, 21 Ark. 487, 494; Co. v. Bagley, 60 Kan. 424; 56 Tynan v. Walker, 35 Cal. 634; Pac. 759.

the members of a specified class of these carriers, the fact that the interstate commerce act is not in *pari materia* with the Safety Appliance Acts, either in its subject-matter, in the evils it assails, or in the remedies it provides, so that neither its language nor the construction thereof is apposite to or controlling of the terms or of the interpretation of the latter act, the reason of the case which as imperatively requires the protection from dangerous vehicles of the employees of companies independently engaged in interstate commerce by railroad entirely within single states, as it does the protection of the servants of other companies employed in the transportation of articles of interstate commerce by railroad, all these and other facts, 'rules and reasons to which reference has been made, have converged upon our minds with compelling power, and forced them to the conclusion that Congress did not intend to, and did not except from the provisions of the Safety Appliance Acts common carriers engaged in the transportation of articles of interstate commerce entirely within single states respectively, and exempt from any common control, management or arrangement with other carriers for a continuous carriage or shipment, but that it intended to, and did, expressly include them therein and subject them thereto.' <sup>59</sup>

§ 177a. **Effect of the case of Southern Railway Co. against United States on Geddes and Colorado cases.**—Naturally one inquires how far the case of Southern Railway Company <sup>59a</sup> has affected either the case of United States against Geddes <sup>59b</sup> or that of United States against Colorado, etc., Railway Company, <sup>59c</sup> or whether that case has any bearing upon the other two. The sole question is whether or not the facts, which are practically identical, detailed in the two cases show a transaction in interstate commerce.

<sup>59</sup> United States v. Colorado, etc., Ry. Co. 157 Fed. 321. In this case a *certiorari* was denied to the defendant. 209 U. S. 544.

<sup>59a</sup> Discussed at length in section 159.

<sup>59b</sup> Discussed in section 175.

<sup>59c</sup> Discussed in section 176.

In the one case the court says they do not, in the other that they do. That is the only question at issue between them. In a later case (or perhaps the same case), the Federal Court for one of the districts of Ohio admits that if the traffic had been carried over the narrow gauge road by through waybills, and it had received its due proportion of the freight charges for the entire distance carried, the transaction would have been one of interstate commerce.<sup>59d</sup> Did the break in the transportation of the traffic, after it had reached the state of its destination, change an interstate carriage into an intrastate carriage was the question at issue between these two cases. But the United States Supreme Court has in a way solved the question. If the company owning the narrow gauge railroad had so used it that it had become "a highway of interstate commerce," then it is immaterial that the particular transaction under consideration was or was not an instance of interstate commerce. Proof of that particular transaction would only be for the purpose of showing that it was "a highway of interstate commerce," or devoted to the business of carrying traffic in interstate commerce. But if the only instances shown were the two detailed in the two opinions in those two cases, then the question would still remain whether or not the evidence was sufficient to show that the railroad line was "a highway of interstate commerce,"—whether a single transaction in interstate commerce over a line of railroad is sufficient to show<sup>59e</sup> that it is "a highway of interstate com-

<sup>59d</sup> United States v. Geddes, 180 Fed. 480, following in this conclusion, Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 193; 16 Sup. Ct. 700; 40 L. Ed. 935.

<sup>59e</sup> It has been held by a state court that the mere fact a railroad has frequently hauled interstate traffic is not sufficient in an action to recover damages for a personal

injury to hold the railroad company amenable to the Federal Safety Appliance Act. Felt v. Denver & R. G. R. Co. 48 Colo. 249; 110 Pac. 215. The soundness of this case, however, is very questionable. for by such use of the railroad line did not the company make it "a highway of interstate commerce?" Of course the Colorado case just cited was decided before the receit



merce." There are a number of decisions which practically hold, and it is usually admitted, under the old interpretation of the statute, that a single package of interstate traffic put aboard a loaded or unloaded freight train will convert the whole train into one of interstate commerce; and if that be true, it is difficult to see why proof of a single transaction of interstate commerce, or carriage of traffic in interstate commerce, is not sufficient to show that the line of railroad was not "a highway of interstate commerce," if the carriage occurred shortly before the date of the commencement of the action wherein it is necessary to show that the railroad line falls within the provisions of the Safety Appliance Act.

§ 178. **Burden—Reasonable doubt.**—What is interstate commerce has been discussed in other sections. He who alleges that the car causing the injury by reason of defective coupling, or rather by a failure to comply with the statute with regard to automatic coupling, has the burden to prove that the car at the time was used in interstate commerce.<sup>60</sup>

case of the Supreme Court of the United States as set forth in section 159. In the light of this recent case of the United States Supreme Court, the soundness of the case of *Campbell v. Chicago R. I. & P. Ry. Co.* 149 Ill. App. 120. affirmed 243 Ill. 620; 90 N. E. 1106, is doubtful.

<sup>60</sup> *United States v. Illinois Central R. Co.* 156 Fed. Rep. 182; *United States v. Central of Ga. Ry.* 157 Fed. Rep. 893; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457; *Missouri Pacific R. Co. v. Kennet (Kan.)* 99 Pac. Rep. 263; *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v.*

*Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Philadelphia, etc., R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410.

In a prosecution to recover the penalty for the violation of the statute within a territory, it is not necessary to prove that the defendant was engaged in interstate commerce, neither is it necessary to show that the car itself was engaged in such commerce. *United States v. Atchison, etc., R. Co.* (see Appendix G).



or was hauled in an interstate commerce train.<sup>60\*</sup> In the case of an empty car hauled in a train, it must be shown that it was used or was intended to be used in moving interstate traffic. In a criminal case it has been held that this must be shown beyond a reasonable doubt.<sup>61</sup> Of course, in a civil case the doctrine of reasonable doubt is not involved. Nearly three years before these cases first cited had been decided the Supreme Court of the United States had said in a civil case: "But the design to give relief was more dominant than to inflict punishment, and the act might be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction."<sup>62</sup> The first case cited in this section was in the District Court for the Western District of Kentucky. A month before it was decided the judge of the District Court for the Northern District of Alabama charged the jury as follows: "The burden is upon the government to make out its case to a reasonable certainty—that is, to your reasonable satisfaction—by a preponderance of the evidence. If you find, therefore, from a preponderance of the evidence in this case that the defendant was a common carrier engaged in interstate traffic by railroad, and that it hauled in interstate traffic the cars named in the petition, when said cars were in such condition that, in order to operate the coupling or uncoupling mechanism thereon, it was necessary for an employe to go between the ends of the cars, you will render your verdict for the plaintiff. If you do not so find, you will render your verdict for

<sup>60\*</sup> *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775.

<sup>61</sup> *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182.

<sup>62</sup> *Johnson v. Southern Pac. Ry. Co.* 196 U. S. 1; 25 Sup. Ct. Rep.

158, reversing 117 Fed. Rep. 462; 54 C. C. A. 508; citing *Taylor v. United States*, 3 How. 197; 11 L. Ed. 559; *United States v. Stowell*, 133 U. S. 1; 10 Sup. Ct. Rep. 244; 33 L. Ed. 555; *Farmers, etc., Bank v. Dearing*, 91 U. S. 29; 23 L. Ed. 196; *Gray v. Bennett*, 3 Met. 522.

the defendant. By a preponderance of the evidence, you are not to understand that the government must make out its case beyond a reasonable doubt. It is sufficient if you are satisfied in your own mind from all the evidence that the defendant did the act complained of.”<sup>63</sup> In other cases it has been held that the government must prove its case beyond a reasonable doubt.<sup>64</sup> But now the great weight of authority is that the government need not prove the case beyond a reasonable doubt, it being sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.<sup>65</sup> In all the later cases it is held that the action to recover the penalty incurred by a failure to properly equip a car is a civil and not a criminal action.

<sup>63</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893.

<sup>64</sup> *United States v. Louisville, etc., R. Co.* 156 Fed. Rep. 193; *United States v. Louisville, etc., R. Co.* 156 Fed. Rep. 195; *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182.

Of course the Government must show that the defective car was used in interstate commerce. *Rosney v. Erie R. Co.* 135 Fed. Rep. 314; 68 C. C. A. 155, or upon a railroad devoted to a highway of interstate commerce, section 159.

<sup>65</sup> *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410 (see Appendix G, p. 311); *United States v. Philadelphia, etc., R. Co.*

162 Fed. Rep. 405 (Appendix G, p. 315); *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403; *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Boston & Maine R. Co.* 168 Fed. 148, and Appendix G; *United States v. Chicago, etc., R. Co.* 173 Fed. 684 (see Appendix G); *United States v. Atchison, etc., R. Co.* 167 Fed. 696 (see Appendix G); *United States v. Terminal R. Assn.* (see Appendix G); *United States v. Nevada, etc., R. Co.* 167 Fed. 695 (Appendix G).

## CHAPTER XI.

### CARS AND THEIR EQUIPMENT.

#### SECTION.

179. What is a "car" within the meaning of the statute.
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181. Empty car—Car used in moving interstate commerce.
182. Empty car used in interstate train.
183. Proviso to Section 6—Four wheeled and logging cars.
184. Kind of couplers to be used.
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#### SECTION.

189. Construction of Section 5.
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195. Question for jury.
196. When a Federal question is presented.
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198. Handholds—Through trains.
199. Handholds on roof of car—Sill steps—Handbrakes—Ladders—Running boards.

§ 179. What is a "car" within the meaning of the statute.—The statute prohibits the use of "any car used in moving interstate traffic not equipped with couplers coupling automatically by impact," and the question has several times come before the courts, "What is a car within the meaning and import of the statute?" This question has been answered by the Supreme Court of the United States where it was asked with reference to a locomotive not having automatic couplers. It will be noted that the first section of the statute requires locomotives to be equipped with power driving-wheel brakes, and says nothing about automatic couplings. From this it was argued that the statute did not require such couplers

upon a locomotive, because it was not a car, the statute having referred to locomotives in one section and cars in another. But the Supreme Court denied this contention. "It is not to be successfully denied," said Chief Justice Fuller, "that they [locomotives] are so required if the words 'any car' of the said section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere in terms required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. This, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word 'car' would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now, as it was necessary for the safety of employes in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be, perhaps more so, as Judge Thayer suggests, 'since engines have occasion to make couplings more frequently.' And manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act.<sup>1</sup> The result is that if the locomotive in question was not equipped with automatic couplers the company failed to comply with

<sup>1</sup>Citing *Winkler v. Philadelphia, etc., R. Co.*, 4 Penn. (Del.) 387; 53 Atl. Rep. 90; *Fleming v. Southern Ry.*, 131 N. C. 476; *East St. Louis, etc., Ry. Co. v. O'Hara*, 150 Ill. 580; 37 N. E. Rep. 917; *Kansas City, etc., R.*

*Co. v. Crocker*, 95 Ala. 412; *Thomas v. Georgia, etc., Co.*, 38 Ga. 222; *Mayor, etc., v. Third Ave. R. Co.*, 117 N. Y. 404, 666; 22 N. E. Rep. 755; *Benson v. Ry. Co.*, 75 Minn. 163; 77 N. W. Rep. 798.

the provisions of the act.”<sup>2</sup> So the act applies to a dining car standing on a side track waiting to be hitched to a through train;<sup>3</sup> and also to a locomotive tender.<sup>4</sup> So the statute applies to empty cars hauled in trains engaged in interstate commerce.<sup>5</sup> It also applies to a steam shovel car while in transportation from one state to another;<sup>6</sup> and to a “shanty” car.<sup>7</sup>

§ 180. **Electric cars.**—It has been held that an electric railroad running its cars from one state to another were

<sup>2</sup> *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 159; reversing 117 Fed. Rep. 462; 54 C. C. A. 508; *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 616; *United States v. Southern Pacific Co.* 167 Fed. 699; *United States v. Southern Ry. Co.* 170 Fed. 1014; *Schlemmer v. Buffalo, R. & P. Ry. Co.* 205 U. S. 1; 27 Sup. Ct. 405; 51 L. Ed. 68; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. 423; *United States v. Chicago, M. & St. P. Ry. Co.* 149 Fed. 486.

But it has been held that a locomotive need not have an automatic coupling at its front end. *Wabash R. Co. v. United States*, 172 Fed. 864. See *Briggs v. Chicago & N. W. Ry. Co.* 125 Fed. 745.

<sup>3</sup> *Johnson v. Southern Pac. Ry. Co.* *supra*; reversing 117 Fed. 462; 54 C. C. A. 508; *Winkler v. Philadelphia, etc., R. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; *Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387; 56 Atl. Rep. 112.

<sup>4</sup> *Winkler v. Philadelphia, etc., R. Co.* 4 Pennewill (Del.), 80; 53 Atl. Rep. 90; *Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387; 56 Atl. Rep. 112; *Fleming v. Southern Ry. Co.* 131 N. C.

476; 42 S. E. Rep. 905; 132 N. E. 714; 44 S. E. Rep. 551; *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 616.

A “tender” is not a “car” under the Michigan statute. *Blanchard v. Detroit, etc., R. Co.* 139 Mich. 694; 103 N. W. Rep. 170; 12 Det. Leg. N. 30; nor under the Massachusetts statute. *Larabee v. New York, N. H. & H. R. Co.* 182 Mass. 348; 66 N. E. 1032.

<sup>5</sup> *Malott v. Hood*, 201 Ill. 202; 66 N. E. Rep. 247; affirming 99 Ill. App. 360; *Voelker v. Chicago, etc., R. Co.* 116 Fed. Rep. 867; *United States v. St. Louis, etc., R. Co.* 154 Fed. Rep. 516; *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182; *United States v. Chicago, etc., Ry. Co.* 156 Fed. Rep. 616.

<sup>6</sup> *Schlemmer*, 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. 423; *United States v. Chicago & N. W. Ry. Co.* 157 Fed. 616.

<sup>7</sup> *Harden v. North Carolina R. Co.* 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784.

All cars used must be so equipped. *Devine v. Illinois Central R. Co.* 156 Ill. App. 369.



not bound to equip the front end of its cars with automatic couplers, unless it intends to couple or uncouple cars at that end.<sup>7a</sup>

**§ 181. Empty car—Car used in moving interstate commerce.**—To come within the provisions of the statute it is not necessary that the car to be equipped was loaded with interstate freight at the time the offense was committed or injury inflicted. “The statutes, state and federal,” said Justice Shiras, “requiring railway companies to equip their cars with automatic couplers were not enacted to protect freight transported therein, but for the protection of the life and limb of the employes who were expected to haul those cars. The beneficent purposes of these statutes are defeated if the employes are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. Legislation on this matter of the use of automatic couplers was sought and obtained from Congress, as well as from the state legislature, so that companies would not be afforded a loophole for escape from liability on the theory that the agencies used in interstate commerce are without the control of the state legislatures. When companies, like the defendant in this case, are engaged in interstate traffic, it is their duty, under the act of Congress, not to use, in connection with such traffic, cars that are not equipped as required by that act. This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate traffic. It frequently happens that the railway companies load cars with live stock or farm produce in the

<sup>7a</sup> Campbell v. Spokane & I. E. R. Co. 188 Fed. 516.

In Taylor v. Prairie Peeble Phosphate Co. (Fla.) 54 So. 904, it was held that a corporation engaged in phosphate mining, and as an incident thereto operates

trolley engines and cars for hauling the phosphate, is not “a railroad company” within the terms and meaning of a statute of the state regulating the liability of railroad companies for injuries to their employes.

western states and carry the same to eastern markets, and then return those cars without a load; but it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty. Whatever cars are designed for interstate traffic, the company owning or using them is bound to equip them as required by the act of Congress; and when it is shown, as it was in this case, that a railway company is using a car for transportation purposes between the two states, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation."<sup>8</sup>

**§ 182. Empty car used in interstate train.**—It has been laid down that in order to inflict a penalty for the use of an empty car hauled in an interstate train it must be shown that the car was used (or intended, perhaps, to be used) in moving interstate traffic.<sup>9</sup> The mere hauling of an empty car from

<sup>8</sup> *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867; *Malott v. Hood*, 201 Ill. 202; 66 N. E. Rep. 247 (affirming 99 Ill. App. 360); *United States v. St. Louis, etc., Ry. Co.* 154 Fed. Rep. 516; *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 182; *United States v. Chicago, etc., R. Co.* 156 Fed. Rep. 616; *United States v. Northern Pac. T. Co.* 144 Fed. Rep. 861; *Johnson v. United States*, 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *Elgin, etc., R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909).

*United States v. International & G. N. R. Co.* 174 Fed. 638; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. 423; *Chicago, M. & St. P. Ry. Co.* 168 Fed. 236; *United States v. Louisville & N. R. Co.* 162 Fed. 185; *United States v. Wheeling & L. E. R. Co.* 167 Fed. 198; *United States v. Atchison, T. & S. F. Ry. Co.*; Ap-

pendix G; *United States v. Chesapeake & O. Ry. Co.*, Appendix G; *United States v. Southern Ry. Co.* 170 Fed. 1014.

The cases squarely hold that the hauling of an empty car from one point in a state to another in the same state in a train where cars are loaded with interstate commerce is a violation of the statute. *Wabash Ry. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *United States v. Atlantic Coast Line R. Co.* Appendix G; *Chicago, etc., R. Co. v. United States*, 168 Fed. Rep. 233 (decided March 10, 1909); *United States v. Southern Ry. Co.* Appendix G. See Section 157.

<sup>9</sup> *United States v. Chicago Ry. Co.* 156 Fed. Rep. 182; *United States v. Great Northern Ry. Co.* 145 Fed. Rep. 438; *United States v. St. Louis, etc., Ry. Co.* 154 Fed. Rep. 516; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; see note 8 above.

one state to another, though it may be for repairing a defect in it, is engaging in interstate commerce;<sup>10</sup> and there is no distinction between hauling a car actually engaged in interstate commerce and hauling one that is generally used in moving interstate traffic, although not actually so engaged at the time when the offense is charged as being committed.<sup>11</sup>

**§ 183. Proviso to Section 6—Four-wheeled and logging cars.**—The plaintiff, nor the government, need not negative the provisions contained in the proviso of Section 6 relating to four-wheeled and logging cars. If the cars that were not properly equipped were of that class it is a matter of defense.<sup>12</sup> The burden is also upon the defendant to show that the cars were of that kind.<sup>13</sup>

**§ 184. Kind of coupler to be used.**—No particular kind of coupler need be used. The sole requirement is that couplers must be used that will couple “automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars” to uncouple them. This is the use. Thus, the court in one case charged the jury as follows: “Should you find the tender at the time of accident was equipped with automatic couplers but that it was so connected with the ‘bull-nose’ coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not com-

<sup>10</sup> *United States v. Chicago, etc.*, Ry. Co. 157 Fed. Rep. 616.

<sup>11</sup> *United States v. Chicago, etc.*, Ry. Co. 157 Fed. Rep. 616; see also Section 159.

<sup>12</sup> *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918; *Ryan v. Carter*, 93 U. S. 78; *United States v. Dixon*, 15 Pet. 141; *Interstate Commerce Commission v. Baird*,

194 U. S. 25; 24 Sup. Ct. Rep. 563; 48 L. Ed. 860; reversing 123 Fed. Rep. 969.

<sup>13</sup> *Schlemmer v. Buffalo, etc., R. Co. supra*; *United States v. Coors*, 17 Wall. 168; 21 L. Ed. 538; *Commonwealth v. Hart*, 11 Cush. 139; *United States v. Denver, etc., R. Co.* 163 Fed. Rep. 519; *Smith v. United States*, 157 Fed. Rep. 721; 85 C. C. A. —; *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918.

ply with the acts of Congress, and was unlawful;"<sup>14</sup> the instruction was held to be a correct statement of the requirement of the statute, the court saying: "The true intent and meaning of the statute is not merely that the cars, etc., used in moving interstate commerce shall be equipped with automatic couplers of the description therein mentioned, but also that such couplers shall be in such condition as to be used automatically while such cars are so engaged."<sup>15</sup> Of course, the person alleging that a car was inadequately equipped has the burden to show that as a fact;<sup>16</sup> and evidence merely of a defect in the coupler will not sustain the averment that the cars were not equipped with automatic couplers.<sup>17</sup> If the lever of a car coupler will not lift the pin from the socket,

<sup>14</sup> *Winkler v. Philadelphia, etc., Ry. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Philadelphia, etc., R. Co.* 160 Fed. Rep. 696; 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Lehigh Valley*, 162 Fed. Rep. 410; *United States v. Atchison, etc., R. Co.* 167 Fed. 696 (Appendix G); *United States v. Chesapeake & Ohio Ry. Co.* (see Appendix G); *United States v. Southern Pacific Co.* 167 Fed. 699 (see Appendix G).

It has been said that the phrase "cars be uncoupled without the necessity of men going between the ends of the cars" was merely descriptive of the equipment required, and does not import that it is the duty of the carrier to keep such equipment in repair at all events. *United States v. Illinois Central*, 170 Fed. 542.

<sup>15</sup> *Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387; 112 Atl. Rep. 56; *Voelker v. Chicago, etc., R. Co.* 116 Fed. Rep. 867; *Southern Ry. Co. v. Simmons*, 105 Va. 651; 55 S. E. Rep. 459; 44 Am. & Eng. R. Cas. 572; *United States v. El Paso, etc.* (see Appendix); *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 158; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *United States v. Chicago, etc., R. Co.* 149 Fed. Rep. 486; *Winkler v. Philadelphia, etc., Ry. Co.* 4 Penn. (Del.) 387; 53 Atl. Rep. 90; *United States v. Atchison, T. & S. F. Ry. Co.* 167 Fed. 696; *United States v. Southern Ry. Co.* 167 Fed. 699.

<sup>16</sup> *Philadelphia, etc., Ry. Co. v. Winkler*, 4 Penn. (Del.) 387; 56 Atl. Rep. 112; *United States v. Louisville & N. R. Co.* 162 Fed. 185; *United States v. Atchison, T. & S. F. Ry. Co.* Appendix G; *United States v. Illinois Central R. Co.* 166 Fed. 997; *United States v. Southern Ry. Co.* 170 Fed. 1014.

<sup>17</sup> *Kansas City, etc., R. Co. v. Flipppo*, 138 Ala. 487; 35 So. Rep. 457.



and the knuckle cannot be drawn open by leaning toward the coupler and using one hand, but to open it requires the presence of the employes between the ends of the cars, and the use of both hands, thereby necessitating the placing of the entire body of the employe between the draw bars of the car, the coupler does not comply with the statute.<sup>18</sup> It is no defense, if a car is not properly equipped, to show that the adjoining car was not, thereby rendering it impossible to use the couplings.<sup>18\*</sup>

<sup>18</sup> Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; s. c. 116 Fed. Rep. 867; United States v. El Paso R. Co. (Appendix G, pp. 274, 279); United States v. Nevada, etc., R. Co. 167 Fed. 695; Appendix G; United States v. Atchison, T. & S. F. Ry. Co. Appendix G; United States v. Indiana Harbor R. Co. 157 Fed. 565.

The Canadian statute (55 Vict. Ch. 30, Sec. 3) prohibits cars having buffers of different heights, so that in coupling they overlap and afford no protection to the person making the coupling, being a "defect in the arrangement of the plant." Board v. Toronto Ry. Co. 22 Ont. App. 78, affirming 24 Can. Sup. Ct. 715. See, also, the Michigan statute. Betterly v. Boyne City, G. & A. R. Co. 158 Mich. 385; 122 N. W. 635; 16 Det. Leg. N. 628.

Where the chain which connected the lock pin to the uncoupling lever was not attached and only need to be connected to make the appliance available, it was held that the car in such condition was out of repair, as it was not legally equipped until the chain was connected; and in the absence of evidence showing that the chain was ever attached, it was presumed, since the working parts were in perfect order, that

the apparatus was only partially completed and that it was the ultimate intention to connect the parts and to thereby comply with the provisions of the statute. United States v. Great Northern Ry. Co. 150 Fed. Rep. 229; United States v. Chicago, etc., R. Co. 149 Fed. Rep. 486; Donegan v. Baltimore, etc., R. Co. 165 Fed. Rep. 869. Clevis pin absent, presumption. United States v. Atchison, T. & S. F. Ry. Co. Appendix G. Bull nose coupler. Philadelphia & R. Ry. Co. v. Winkler, 4 Penn. (Del.) 387; 56 Atl. 112. Kinked chains. United States v. Denver & R. G. R. Co. 163 Fed. 519; United States v. Southern Pacific Co. 167 Fed. 699; Norfolk & W. Ry. Co. v. U. S., 191 Fed. 302. Chain connected with hand rail. United States v. Toledo Terminal R. Co. Appendix G. Worn out coupler. Voelker v. Chicago, M. & St. P. Ry. Co. 116 Fed. 867. Inoperative coupler. Taggart v. Republic Iron & Steel Co. 141 Fed. 910.

<sup>18\*</sup> United States v. Atchison, etc., R. Co. (see Appendix G). If a servant of the company deliberately puts on an imperfect coupling the company is still liable. United States v. Southern Pac. Co. 167 Fed. 699 (see Appendix G); Chicago, etc., R. Co. v. King, 169 Fed. Rep. 372 (decided February 3, 1909).



§ 185. "Without the necessity of men going between the ends of cars."—The words "without the necessity of men going between the ends of cars" applies more than to the act of coupling. "The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word 'uncoupled,' this becomes entirely clear." "In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with."<sup>19</sup> So the car must be equipped that it can be coupled from either side without going between them to couple them; and if so equipped that they can be coupled from one side without going between them and not from the other, the statute is not complied with.<sup>20</sup> If the tracks are so uneven or curved that two cars coming together will not couple by compact, then they are not equipped as the statute requires, although upon a level or straight track they would readily so couple.<sup>20a</sup> The couplings must be sufficient so the cars can be both coupled and uncoupled without the trainmen being under the necessity of going between the cars.<sup>20b</sup> If the cars be so loaded that

<sup>19</sup> Johnson v. Southern Pac. Ry. Co. 196 U. S. 1; 25 Sup. Ct. Rep. 158; reversing 117 Fed. Rep. 462; United States v. Central of Ga. Ry. Co. 157 Fed. Rep. 893; Harden v. North Carolina R. Co. 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784; Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; United States v. Chicago, etc., Ry. Co. 149 Fed. Rep. 486; Schlemmer v. Buffalo, etc., Ry. Co. 205 U. S. 1; 27 Sup. Ct. Rep. 407; United States v. El Paso, etc., R. Co. (Appendix G). As to the use of the comma in the statute, see also, United States v. Erie R. Co. 166 Fed. 352. See, also, Norfolk & W. Ry. Co. v. United States, 177 Fed. 623; United States v. Nevada County Narrow

Gauge Co. 167 Fed. 695; Blackburn v. Cherokee Lumber Co. 152 N. C. 361; 67 S. E. 915; McGarvey v. Detroit, T. & I. Ry. Co. 83 Ohio St. 273; 94 N. E. 424 (Ohio statute).

<sup>20</sup> United States v. Central of Ga. Ry. Co. 157 Fed. Rep. 893; Southern Ry. Co. v. Simmons, 105 Va. 651; 55 S. E. Rep. 459; 44 Am. & Eng. R. Cas. 572; United States v. Atchison, etc., R. Co. (Appendix G); United States v. Louisville & N. R. Co. 162 Fed. 185 (see Suttle v. Choctaw, O. & G. R. Co. 144 Fed. 668; 75 C. C. A. 470); Norfolk & W. Ry. Co. v. United States, 177 Fed. 623.

<sup>20a</sup> Hohenleitner v. Southern Pacific Co. 177 Fed. 796.

<sup>20b</sup> Southern Railway Co. v. Simmons, (S. C.); 55 S. E. 459.

they cannot come together so as to couple by compact, they are not properly equipped.<sup>20c</sup>

§ 186. Both ends of every car must be equipped with automatic couplers.—A car is not properly equipped unless it is equipped on both ends with automatic couplers. “The Safety Appliance Act requires that each coupler on a car be operative in itself, so an employe will not have to go to another car to couple or uncouple the car in question. The provisions as to coupling and uncoupling apply to the coupler on each end of every car subject to the law. It is wholly immaterial in what condition was the coupler on the adjacent car or any other car or cars to which each car sued upon was, or was to be, coupled. The equipment on each end of these two cars must be in such condition that whenever called upon for use it can be operated without the necessity of going between the ends of the cars. This is the plain and unambiguous meaning of the statute.”<sup>21</sup>

<sup>20c</sup> *United States v. Illinois Central R. Co.* 177 Fed. 801.

<sup>21</sup> *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; *United States v. Philadelphia & R. Ry. Co.* 160 Fed. 696; *United States v. Central of Georgia*, 157 Fed. 893; *United States v. Southern Pacific Co.* 167 Fed. 699; *United States v. Baltimore & O. R. Co.* 170 Fed. 456; *United States v. Denver & R. G. Co.* 163 Fed. 519; *United States v. Wabash R. Co.* Appendix G; *United States v. Philadelphia & R. Ry. Co.* Appendix G; *United States v. Lehigh Valley R. Co.* Appendix G; *United States v. Pennsylvania R. Co.* Appendix G; *United States v. Louisville & N. R. Co.* 162 Fed. 185; *United States v. Chicago Great W. Ry. Co.* 162 Fed. 775; *United States v. Atchison, T. & S. F. Ry. Co.* Appendix G; *United States v.*

*Nevada County, N. G. R. Co.* 167 Fed. 695; *United States v. Atchison, T. & S. F. Ry. Co.* 167 Fed. 696; *United States v. Chesapeake & O. Ry. Co.* Appendix G; *United States v. Southern Pacific Co.* 167 Fed. 699; *United States v. Southern Ry. Co.* 170 Fed. 1014; *United States v. Baltimore & O. R. Co.* 170 Fed. 456; *United States v. Pennsylvania R. Co.* Appendix G; *United States v. Southern Pacific Co.* Appendix G.

A man engaged in connecting or disconnecting air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the statute, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars. *United States v. Boston, etc., R. Co.* 168 Fed. 148 (see Appendix G).

The coupling must be in such a condition that it can be operated

§ 187. **Uncoupling.**—The coupler must be sufficient to enable the employee to uncouple the car without going between the cars coupled, for that purpose.<sup>22</sup> If, therefore, a coupler couples by impact, but cannot be uncoupled without the employee going between the cars, it is not sufficient.<sup>23</sup>

§ 188. **Erroneous instructions concerning height of draw bars.**—An instruction is erroneous which declares that the law requires draw bars of a fully loaded car to be of the height of thirty-one and one-half inches, and that if either of the cars causing the injury to the employe varied from the requirement the defendant railroad had failed in the performance of its duty; especially where the evidence of the railroad company showed that the draw bar of the fully loaded car was thirty-two and one-half inches in height. A verdict for the plaintiff on such a condition of the record cannot stand. And so it is error to refuse to charge the jury “that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of

with a reasonable effort, and not by a great effort without going between the cars. *United States v. Atchison, etc.*, R. Co. 167 Fed. 696 (see Appendix G).

<sup>22</sup> *United States v. Chicago, etc.*, Ry. Co. 149 Fed. Rep. 486; *United States v. Great Northern Ry. Co.* 150 Fed. Rep. 229; *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. El Paso, etc.*, R. Co. Appendix G.

<sup>23</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408 (Appendix G); *United States v. Philadelphia, etc.*, R. Co. 162 Fed. Rep. 408 (Appendix G); *United States v. Philadelphia, etc.*, R. Co. 162 Fed. Rep. 405 (Appendix G); *United States v. Lehigh Valley R.*

*Co.* 162 Fed. Rep. 410 (Appendix G); *United States v. Chesapeake, etc., Ry. Co.* (Appendix G); *United States v. Southern Pac. Ry. Co.* 167 Fed. 699 (Appendix G); *United States v. Atchison, etc.*, R. Co. 167 Fed. 696 (see Appendix G); *Norfolk & W. Ry. Co. v. United States*, 177 Fed. 623; *United States v. Denver & R. G. Co.* 163 Fed. 519; 90 C. C. A. 329; *Johnson v. Southern Pacific*, 196 U. S. 1; 25 Sup. Ct. 158; 49 L. Ed. 363; *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. 522; *United States v. Chicago, M. & St. P. Ry. Co.* 149 Fed. 486; *United States v. Nevada Co. N. G. Ry. Co.* 167 Fed. 695; *Southern Ry. Co. v. Simmons*, 105 Va. 651; 55 S. E. 459.

full three inches between the center of the draw bars of such cars, without regard to the amount of weight in the partially loaded car.”<sup>24</sup> So an instruction as follows is erroneous: “The court charges you that the act of Congress allows a variation in height of three inches between the centers of draw bars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the center of the draw bar shank or draft line.”<sup>25</sup>

**§ 189. Construction of Section 5.**—The Supreme Court of the United States has thus construed Section 5 so far as it relates to couplings: “We think that it [Section 5] requires the center of the draw bars of freight cars used on standard gauge railroads shall be, when the cars are empty, thirty-four and one-half inches above the level of the tops of the rails; that it permits, when a car is partly or fully loaded, a variation in the height downward, in no case to exceed three inches; that it does not require that the variation shall be in proportion to the load, nor that a fully loaded car shall exhaust the full three inches of the maximum permissible variation and bring its draw bars down to the height of thirty-one and one half inches above the rails. If a car, when unloaded, has its draw bars thirty-four and one-half inches above the rails, and, in any stage of loading, does not lower its draw bars more than three inches, it complies with the requirements of the law. If, when unloaded, its draw bars are of greater or less height than the standard prescribed by

<sup>24</sup> “This request, taken in connection with the instruction that the drawbar should be of the height prescribed by this act, expressed the true rule, and should have been given.”

<sup>25</sup> “It is based upon the theory that the height of the drawbars of unloaded cars may vary three inches, while the act, as we have

said, requires that the height of the drawbars of unloaded cars shall be uniform.” *St. Louis, etc., Ry. Co. v. Taylor*, 210 U. S. 281; 28 Sup. Ct. Rep. 616; *United States v. Atchison, T. & S. F. Ry. Co.* Appendix G; *St. Louis, I. M. & S. Ry. Co. v. Neal*, 83 Ark. 591; 78 S. W. 220.



the law, or if, when wholly or partially loaded, its draw bars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law.”<sup>26</sup>

§ 190. **Insufficient operation of coupler.**—The statute applies to an instance of insufficient operation of a proper coupler.<sup>27</sup>

§ 191. **Improper operation of sufficient coupler.**—The statute only makes it unlawful to use a car which is not equipped with the required couplers, and it cannot be held that it is unlawful for a carrier’s employees to fail to adjust the appliance with which the car has been, and at the time is properly equipped. “The act requires equipment, and, although there is no express language to that effect, the act must be construed to mean equipment which, if there, is capable of being operated; but no penalty is imposed, if, being there, it is not in fact efficiently operated by those in and not the proper manipulation of that equipment by the employees.”<sup>28</sup>

§ 192. **Preparation of coupler for coupling.**—The act of coupling and the preparation of the coupler for the impact are not to be distinguished. Such preparation and impact are so connected that they are indispensable parts of the larger act to which the statute applies and regulates, the performance of which Congress intended to be relieved from unnecessary risk and danger to life and limb.<sup>29</sup>

§ 193. **“M. C. B. defect card.”**—The placing of a “M. C. B. defect card” upon a car with an annotation thereon of

<sup>26</sup> St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616.

<sup>27</sup> Taggart v. Republic Iron & Steel Co. 141 Fed. 910; Elmore v. Seaboard Air Line Ry. Co. 130 N. C. 506; 41 S. E. 736. *Contra*, United States v. Illinois Central R. Co. 156 Fed. Rep. 182.

<sup>28</sup> United States v. Chicago, etc., R. Co. 156 Fed. Rep. 182.

<sup>29</sup> Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264. See note 21 of this chapter; United States v. Nevada Co. N. G. R. Co. 167 Fed. 695.



defects forbidden by the Safety Appliance Act, thereby informing all companies receiving it that the company so placing the card on the car sent such car out in a defective condition and that the companies receiving and hauling the car would not have to account to the former company for the particular defect noted on the car, is such a deliberate violation of the statute as amounts to a defiance of the law.<sup>30</sup>

**§ 194. Receiving an improperly equipped foreign car.—**

If a foreign car be not equipped with automatic couplers, a railroad company to whom it is tendered for transportation by a connecting line is not bound to receive it for transportation over its lines, and may lawfully refuse to accept it until it is properly equipped.<sup>31</sup> But if it does receive it and uses it or hauls it upon its tracks, the receiving company will be liable.<sup>32</sup>

**§ 195. Question for jury.—**It is a question for the jury whether the tender and car between which the employee was injured were at the same time engaged in interstate commerce; and they may be instructed that if they so find, the act of Congress was applicable.<sup>33</sup>

**§ 196. When a federal question is presented.—**Where the question arose whether or not a federal question was involved in a case brought under the Safety Appliance Act, the Su-

<sup>30</sup> *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931; 86 C. C. A. 95; 14 Am. & Eng. Ann. Cas. 233; reversed, but not on this point, *Delk v. St. Louis & S. F. R. Co.* 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590; *United States v. Chicago, etc.*, R. Co. 173 Fed. 684 (see Appendix G). A bad order card is placed on a car by the company's inspector to indicate that the car must be repaired before moving. Such a card is never em-

ployed as notice to connecting lines.

<sup>31</sup> See Sec. 3 of Act.

<sup>32</sup> *United States v. Chicago, etc.*, Ry. Co. 149 Fed. Rep. 486; see, also, *United States v. Chicago, etc.*, Ry. Co. 143 Fed. Rep. 373.

<sup>33</sup> *Philadelphia, etc.*, R. Co. v. *Winkler*, 4 Penn. (Del.) 387; 56 Atl. Rep. 112; affirming 4 Penn. (Del.) 80; 53 Atl. Rep. 90; *Voelker v. Chicago, etc.*, R. Co. 116 Fed. Rep. 867; *Crawford v. New York, etc.*, R. Co. 10 Am. & Eng. Neg. Cas. 166.

preme Court announced this rule: "Where a party to a litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed by this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied him. Jurisdiction so clearly warranted by the constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."<sup>34</sup> But merely because an action for personal injuries is based upon the Federal statute has been held not enough to entitle the defendant to have the cause removed to the United States Court.<sup>34a</sup>

<sup>34</sup> St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

The court said the above stated principles were derived from the following cases: McCormick v. Market Bank, 165 U. S. 538; 17 Sup. Ct. Rep., 433. 41 L. Ed. 817; affirming 162 Ill. 100; 44 N. E. Rep. 381; California Bank v. Kennedy, 167 U. S. 362; 17 Sup. Ct. Rep. 831; 42 L. Ed. 198, reversing 101 Cal. 495; 40 Am. St. Rep. 69; 35 Pac. Rep. 1039; San Jose Land, etc., Co. v. San Jose Ranch Co. 189 U. S. 177; 23 Sup. Ct. Rep. 487; 47 L. Ed. 765; affirming 129 Cal. 673; 62 Pac. Rep. 269; Nutt v. Knut, 200 U. S. 12; 26 Sup. Ct. Rep. 216; 50 L. Ed. 348; affirming 83 Miss. 365; 35 So. Rep. 686; 102 Am.

St. Rep. 452; 84 Miss. 465; 36 So. Rep. 689; reversing 84 Miss. 465; 36 So. Rep. 689; Rector v. City Deposit Bank, 200 U. S. 405; 26 Sup. Ct. Rep. 289; 50 L. Ed. 527; Eau Claire National Bank v. 527; Illinois Cent. R. Co. v. McKendree, 203 U. S. 514; 27 Sup. Ct. Rep. 153; 51 L. Ed. 298; Eau Claire National Bank v. Jackman, 204 U. S. 522; 27 Sup. Ct. Rep. 391; 51 L. Ed. 596; affirming 125 Wis. 465; 104 N. W. Rep. 98; Hammond v. Whitledge, 204 U. S. 538; 27 Sup. Ct. Rep. 396; 51 L. Ed. 606; affirming 189 Mass. 45; 75 N. E. Rep. 222.

<sup>34a</sup> Myrtle v. Nevada, C. & O. Ry. Co. 137 Fed. 193; St. Louis, I. M. & S. R. Co. v. Neal, 83 Ark. 591; 98 S. W. 958; Inter-

§ 197. **State statute on same subject applicable to intra-state commerce.**—Possibly a state statute requiring automatic couplers upon cars used within a state might be enforced in a suit to recover damages caused because of a failure to equip cars used in interstate commerce.<sup>35</sup>

§ 198. **Handholds—Through train.**—The statute requires cars to be furnished with handholds. Cars in a train operated by a railway company engaged in the transportation of freight across a state and beyond its boundaries is a “through train,” and every car in it must be furnished with “handholds.” A failure to furnish them is negligence *per se*.<sup>36</sup> A brakeman using a defective handhold does not assume the risk of defectiveness.<sup>37</sup> These handholds or grabirons must be at both ends of the car.<sup>38</sup> The grabirons must be secure; but if each end of the car has some other appliance, such as a ladder or brake lever, which affords the same security as if a grabiron were at that point, the statute is not violated.<sup>39</sup> Passenger coaches must have proper grabirons.<sup>40</sup> “The purpose

national & G. N. Ry. Co. v. Elder, 99 S. W. 856; Southern Ry. Co. v. Carson, 194 U. S. 137; 24 Sup. Ct. 609; 48 L. Ed. 907; affirming 68 S. C. 55; 46 S. E. 525.

<sup>35</sup> See Voelker v. Chicago, etc., R. Co. 116 Fed. Rep. 867; Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487; 35 So. Rep. 457; *contra*, Rio Grande So. R. Co. v. Campbell, 44 Colo. 1; 96 Pac. Rep. 986; State v. Adams Exp. Co. 170 Ind. 138; 85 N. E. 337, 936; State v. Missouri Pac. Ry. Co. (Mo.) 11 S. W. Rep. 500. But see, Blanchard v. Detroit, etc., R. Co. 139 Mich. 694; 103 N. W. Rep. 170; 12 Det. Leg. N. 30, and Taylor v. Boston, etc., R. Co. 188 Mass. 390; 74 N. E. Rep. 591. See Sec. 150a.

<sup>36</sup> Malott v. Hood, 99 Ill. App. 360; affirmed, 201 Ill. 202; 66 N. E. Rep. 247; United States v.

Boston & Maine R. Co. (Appendix G); United States v. Terminal, etc. (Appendix G); Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423; United States v. Southern Ry. Co. 167 Fed. 699 (see Appendix G); United States v. Atlantic Coast Line R. Co. (see Appendix G); Wabash Ry. Co. v. United States, 168 Fed. Rep. 1 (decided February 3, 1909); see, also, Section 167, note 34, and Sections 212, 213.

<sup>37</sup> Coley v. North Carolina R. Co. 128 N. C. 534; 39 S. E. 43.

<sup>38</sup> United States v. Illinois Central R. Co. 166 Fed. 997; United States v. Chicago & N. W. Ry. Co. 157 Fed. 616.

<sup>39</sup> United States v. Boston & M. R. Co. 168 Fed. 148.

<sup>40</sup> Norfolk & W. Ry. Co. v. United States, 177 Fed. 623.

of requiring grabirons or handholds to be placed at the end of the cars used in interstate commerce seems to have been to afford greater security for employees when they are in the act of coupling or uncoupling cars.”<sup>41</sup>

**§ 199. Handholds on roof of car—Sill steps—Handbrakes—Ladders—Running boards.**—The handholds or grabirons discussed in the next preceding section are those at the end of the car so as to enable the brakemen to safely couple the cars.<sup>42</sup> The statute of 1910, supplemental to the Safety Appliance Acts of 1893 and 1903, provides that “it shall be unlawful for any common carrier subject to” their provisions “to haul, or permit to be hauled or used, on its line any car subject to” its provisions not “equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards” must be “equipped with such ladders and running boards, and all cars having ladders” must be “equipped with secure handholds or grabirons on their roofs at the top of such ladders.” “In the loading and hauling of long commodities, requiring more than one car, the handbrakes may be omitted on all save one of the cars while they are thus combined for such purpose.” The Interstate Commerce Commission is required to “designate the number, dimensions, location, and manner of application of the appliances provided for” in the above quotation, and also in section four of the Act of 1893, and to “give notice of such designation to all common carriers subject to the provisions” of the statute by such means as they may deem proper. Thereafter the number, location, dimensions, and manner of application as designated by the Commission “shall remain as the standards of equipment to be used on the cars subject

<sup>41</sup> Dawson v. Chicago, R. I. & P. Ry. Co. 114 Fed. 870; United States v. Illinois Central R. Co. 166 Fed. 997; United States v.

Wabash Terminal Ry. Co. Appendix G.

<sup>42</sup> Dawson v. Chicago, R. I. & P. Ry. Co. 114 Fed. 870; Section 4 of Act of 1893.

to the provisions of" the statute, "unless changed by an order of said Interstate Commission, to be made after full hearing and good cause shown." Failure to comply with the requirements of this order is an offense. After hearing the Commission is empowered to "modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory."<sup>43</sup>

<sup>43</sup> For air brakes, see Section 215. A man engaged in connecting the air hose between the cars is engaged in coupling or uncoupling the cars within the meaning of the statute, if it is necessary

for him to connect or disconnect that hose in order to connect or disconnect the cars. *United States v. Boston & M. R. Co.* 168 Fed. 148.



## CHAPTER XII.

### REPAIRS.

#### SECTION

- 200. Degree of diligence to make repairs.
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- 202. Duty to maintain car in repair is an absolute one.
- 203. Presumption—Diligence to discover defects and make repairs in transit.
- 204. Distinction between an action to recover a penalty and to recover damages.
- 205. Cars in transit—Construction of statute.
- 206. Hauling car to nearest repairing point.
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- 208. Repairing car in transit.

#### SECTION

- 209. Repairs during journey.
- 210. Establishing repair shops and material.
- 211. Knowledge of defect not an element of the defense.
- 212. Failure to provide or repair defective handholds.
- 213. Use of "shims"—Common-law duty of master not applicable—Fellow servant's neglect—Construction of statute—Hand grips.
- 214. Repairing couplers—Other act of negligence aiding negligence with reference to couplers.
- 215. Failure to equip train with air brakes.

§ 200. **Degree of diligence to make repairs.**—What degree of diligence is necessary in making repairs has been variously decided. Thus, in one case it was said: "The utmost diligence does not seem to have been used to discover and repair the defect in this car."<sup>1</sup> In another case the court said: "If diligence is to be recognized as a defense, certainly it must be the highest form of diligence. Without regard to what the rule of liability may be, the exercise of the greatest care in the matter of equipment and maintenance will keep coupling appliances in such condition as to exclude, except in very remote instances, the necessity of prosecutions for the enforcement of the act." The facts in this case, recited in the opinion, show why the court did not think a proper de-

<sup>1</sup> United States v. Louisville, etc., R. Co. 156 Fed. Rep. 193.

gree of diligence had been observed to discover the defect and repair it. The defect was occasioned by the loss of a clevis pin. "The car came to the Indiana Harbor Road," said Judge Landis, "from another carrier at a junction point. Here the defendant maintained a car inspector, who testified that, before cars were moved from there by his company, he 'customarily,' or 'usually,' or 'generally,' made an examination of the coupling apparatus, which examination consisted of looking at the coupler and lifting the lever. If such inspection disclosed no defect, the inspector passed the car, otherwise he made a record of the fact in a book kept for that purpose, and the repairs were made before the car was moved. The witness did not recall the particular car in question, but his book contained no record of the car, which indicated that his inspection showed the appliances to be in good condition. Even assuming the government's view of the law<sup>2</sup> to be wrong, the finding in this case must be against the railway company on the questions of fact. The distance traveled by the car over defendant's track was but a few miles. If, at the initial point, the pin had been in place and properly fastened, it is not probable that it would have been displaced by the ordinary handling of the car to destination. The fact that the pin was missing at the end of the journey is strongly indicative that the defect existed at the point of origin, that is to say, that the pin either was not then present, or was so badly worn or loosened, that proper inspection would have disclosed the fact." The court, therefore, ordered a decree entered against the railroad defendant thus found delinquent.<sup>3</sup>

<sup>2</sup> "That it is no defense to a prosecution of this character that the carrier exercised diligence to provide and maintain its equipment with safety appliances, as required by the act."

<sup>3</sup> *United States v. Indiana Harbor Co.* 157 Fed. Rep. 565; see, also, *United States v. Atlantic, etc., R. Co.* (Appendix G).

The burden is upon the defendant to show an excuse for not making the repairs in time. *United States v. Illinois Central R. Co.*

170 Fed. 542; *United States v. Erie R. Co.* 166 Fed. 352; *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. 236.

It is not enough for a defense that the railway company equipped a car properly, if it becomes out of repair. It must repair the defect. *United States v. Erie R. Co.* 167 Fed. 352; *United States v. Great Western Ry. Co.* 174 Fed. 399; *Chicago, B. & Q. Ry. Co. v. United States*, 170 Fed. 556.

§ 201. **Use of diligence to discover defects—Want of knowledge of defect.**—If a railroad company has properly equipped its cars, still it will be liable if they become defective, thereby causing an injury; and it is no defense that the defendant company exercised reasonable care and diligence to discover and repair the defect before placing the car in service. “The statute says,” said Justice Humphrey, “that common carriers shall not haul or use cars in a certain described condition. The defendant asks the court to hold, in effect, that they cannot haul the car in that condition, *provided*, that they have failed to use diligence to discover its defective condition, but that if they have used *due diligence* they may haul the car in its defective condition. In all such cases it would be impossible for the officers of the government to determine in advance whether a statute has been violated or not; but before a prosecution could be properly instituted they should go to the defendant company, ascertain what care it had used in regard to a certain car, determine as a matter of fact and law whether the acts of the defendant constituted *due diligence*, and from that determine whether a prosecution might be safely instituted. It is evident that such a defense would take the very life out of the act in question and render its enforcement impossible, except in a few isolated cases. The courts cannot, by judicial legislation, read into the act any language which will excuse offenders any more than they can read into it language which would increase their liability. Courts must enforce law as they find it. \* \* \* I have been unable to find that this character of defense has been sustained in any case which reached the courts of last resort. Counsel for defendant has not cited any authority in support of this doctrine of *due diligence* as a defense to a penal action. It is in the same category with the question of *intent* under the revenue laws and of *good faith* under statutes against handling adulterated goods, drugs, etc. It is certainly well established that the good intentions, or the lack of evil intent, on the part of a

liquor dealer is no defense to a prosecution for the statutory penalty. If this is no defense in a *quasi* criminal action, it certainly would be none in a civil action involving the same facts." "The propositions of law submitted by the defendant are, therefore, denied."<sup>4</sup> This case was approved in a subsequent case in which it was said: "The railroad companies are charged, as I have shown, with the duty of hauling only such cars as are provided with automatic couplers in suitable repair, so as to be operative without the necessity of employees going between the cars; and it would go far to subvert the law and the purpose thereof if they were permitted to say that they had no knowledge of the defect, and that, therefore, they were not liable under the act. The companies must ascertain for themselves and at their peril whether or not they have taken up or are hauling cars with defective couplers. Their intention to do right does not relieve them."<sup>5</sup> I hold, therefore, that want of knowledge of the defects on the part of the defendant company does not constitute a defense."<sup>6</sup> Under the recent decisions *knowledge* is not an element of the defense.<sup>6\*</sup>

<sup>4</sup> United States v. Southern Ry. Co. 135 Fed. Rep. 122.

<sup>5</sup> Citing United States v. Great Northern Ry. Co. 150 Fed. 229.

<sup>6</sup> United States v. Southern Pac. Co. 154 Fed. Rep. 897; United States v. Atlantic, etc., R. Co. 153 Fed. Rep. 918. This is now the rule of the majority of the cases, especially those of a recent date. United States v. Atchison, etc., R. Co. 167 Fed. 636 (Appendix G); United States v. Wabash R. Co. 168 Fed. 1; (Appendix G); United States v. Atchison, etc., Ry. Co. 163 Fed. Rep. 517; United States v. Chicago, etc., R. Co. 163 Fed. Rep. 775; United States v. Baltimore, etc., R. Co. (Appendix G); United States v. Erie R. Co. 166 Fed. Rep. 352; United States v.

Southern Ry. Co. 167 Fed. 699; Appendix G; Atlantic Coast Line R. Co. v. United States, 168 Fed. Rep. 175; United States v. Atlantic Coast Line Co. (Appendix G); Chicago, etc., R. Co. v. United States, 165 Fed. Rep. 423; Chicago, etc., R. Co. v. King, 169 Fed. Rep. 372. But see United States v. Illinois Cent. R. Co. 170 Fed. 542 (Appendix G).

<sup>6\*</sup> United States v. Chicago, etc., R. Co. 156 Fed. Rep. 180; United States v. Philadelphia, etc., R. Co. 160 Fed. 696 (Appendix G); United States v. Pennsylvania R. Co. (Appendix G); United States v. Baltimore, etc., R. Co. (Appendix G); United States v. Lehigh Valley R. Co. 160 Fed. 696 (Appendix G); United States v. Chi-



§ 202. **Duty to maintain car in repair is an absolute one.**—Whether or not the duty of a railroad company to equip its cars with automatic couplers as the statute requires, and to maintain them in that condition, is an absolute one or one merely requiring the exercise of reasonable diligence, has recently been settled by the Supreme Court of the United States. Under the interpretation of this court given the statute, reasonable diligence to equip cars with automatic couplings and to maintain them in repair is not a defense, either in an action to recover the penalty prescribed by the statute for a failure in this respect or to recover damages sustained by an employee by reason of their defective condition. The court discussed at great length Taylor's case.<sup>6a</sup> In that case the court used this language: "In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanations cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty

cago, etc., R. Co. 162 Fed. Rep. 775; United States v. Erie R. Co. 166 Fed. Rep. 352.

The inspectors of the government are not required to notify the employees of the railroad company of defects on cars. United States v. Atchison, etc., R. Co. 167 Fed. 696 (Appendix G); United States v. Southern Ry. Co. (Appendix G).

\* This section is retained, although it is, in its main point, in direct conflict with the rule laid down in the next preceding section.

<sup>6a</sup> St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. 616; 52 L. Ed. 1061. This case first appeared as Neal v. St. Louis, I. M. & S. R. Co. 71 Ark. 445; 78 S. W. 220, where it was reversed. It was again appealed and the judgment affirmed. St. Louis, I. M. & S. R. Co. v. Neal, 83 Ark. 591; 98 S. W. 958. And it was then appealed to the United States Supreme Court and again affirmed.



of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibition of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts." In the first appeal, the Supreme Court of Arkansas had said: "The statute upon which this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height, but it imposes as a positive duty upon railway companies that they shall do so. \* \* \* The act of Congress requiring railroad companies to equip their cars with drawbars of standard and uniform heights, specifically proves that an employee injured by the failure of a company to comply with the act shall not be deemed to have assumed the risk by reason of his knowledge that the company had not complied with the statute, and there is no question of assumed risk presented."<sup>6b</sup> The Federal Supreme Court, in this recent case regarded the Taylor case as having settled that it was the absolute duty of an interstate railway company to maintain its cars, after their equipment, in a proper condition, and that it was no defense that it had used reasonable diligence to keep them in repair.<sup>6c</sup> The court quoted with approval the following language used by Mr. Justice Van Devanter (now on the Federal Supreme Court Bench), used in a Circuit Court of Appeals: "It is now authoritatively settled that the duty of the railway company in situations where the Congressional law is applicable is not that of exercising reasonable care in maintaining safety appliances in operative condition, but is absolute. In that case the common law rules in respect

<sup>6b</sup> Neal v. St. Louis, I. M. & S. R. Co. 71 Ark. 445; 78 S. W. 220.

<sup>6c</sup> Chicago, B. & Q. Ry. Co. v. United States, 220 U. S. 559; 31

Sup. Ct. 612; 55 L. Ed. 521; Southern Ry. Co. v. United States,

222 U. S. 20; 32 Sup. Ct. 2; 56 L. Ed. —.

of the exercise of reasonable care by the master, and of the non-liability by the master for the negligence of a fellow-servant, were involved by the railway company, and were held by the court to be superseded by the statute. \* \* \* While the defective appliance in that case<sup>6d</sup> was a draw-bar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguish that case from this. As respects the nature of the duty placed upon the railway company, section five, relating to drawbars, is the same as section two, relating to couplers; and section six, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever property would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.”<sup>6e</sup> On the same day the Supreme Court settled the question holding it was the absolute duty of a railway company to equip its cars as the statute required and to so maintain them without regard to reasonable care or the degree of diligence, it reaffirmed the rule it had approved.<sup>6f</sup>

<sup>6d</sup> The Taylor case above referred to.

<sup>6e</sup> United States v. Atchison, T. & S. F. R. Co. 163 Fed. 517; 90 C. C. A. 327.

<sup>6f</sup> Delk v. St. Louis & S. F. R. Co. 220 U. S. 580; 31 Sup. Ct. 617; 55 L. Ed. 590; reversing 170 Fed. 556; 95 C. C. A. 642.

The following cases in lower courts had accepted the rule laid down in the Taylor case and as subsequently affirmed by the Supreme Court: United States v. Philadelphia & R. Ry. Co. 162 Fed. 403; United States v. Lehigh

Valley R. Co. 162 Fed. 410; United States v. Denver & R. G. R. Co. 163 Fed. 519; 90 C. C. A. 329; Chicago, M. & St. P. R. Co. 165 Fed. 423; 91 C. C. A. 371; 20 L. R. A. (N. S.) 473; Donegan v. Baltimore & N. Y. R. Co. 165 Fed. 689; 91 C. C. A. 555; United States v. Erie R. Co. 166 Fed. 352; United States v. Wheeling & L. E. R. Co. 167 Fed. 198, 201; Atlantic Coast Line R. Co. v. United States, 168 Fed. 175, 184; 94 C. C. A. 35; Chicago Junction R. Co. v. King, 169 Fed. 372, 377; 94 C. C. A. 652; United States v. Southern

§ 203. **Presumption—Diligence to discover defects and make repairs in transit.\***—Not at one are courts with respect to the degree of diligence that must be exercised to discover defects in cars and make repairs. In some of the cases little or no excuse is accepted as a defense, even in a criminal case; while in others more leniency is shown, at least in criminal cases. Such a case is one that arose in the United States Court for the District of Nebraska. In that case the testimony showed that the defective car had at one time been equipped in the manner required by law, and the court declared that it could not presume that any part

Pac. Co. 169 Fed. 407, 409; 94 C. C. A. 629; *Watson v. St. Louis, I. M. & S. R. Co.* 169 Fed. 942; *Wabash R. Co. v. United States*, 172 Fed. 864; 97 C. C. A. 284. *Atchison, T. & S. F. R. Co. v. United States*, 172 Fed. 1021; 96 C. C. A. 664; *United States v. Atchison, T. & S. F. R. Co.* 163 Fed. 517; 90 C. C. A. 327; *Norfolk & W. R. Co. v. United States*, 177 Fed. 623; 101 C. C. A. 249; *United States v. Illinois C. R. Co.* 177 Fed. 801; 101 C. C. A. 15; *Johnson v. Great Northern R. Co.* 178 Fed. 646; 102 C. C. A. 89; *Siegel v. New York, C. & H. R. R. Co.* 178 Fed. 873.

In the following cases the same rule was adopted: *Chicago, B. & Q. Ry. Co. v. United States*, 179 Fed. 556; *United States v. Illinois Central R. Co.* 170 Fed. 542; *United States v. Philadelphia & R. Ry. Co.* 160 Fed. 696; *United States v. Southern Pacific Co.* 167 Fed. 699; *United States v. Louisville & N. R. Co.* 156 Fed. 193; *United States v. Illinois Central R. Co.* 156 Fed. 182; *Brinkmeir v. Missouri Pacific Ry. Co.* 81 Kan. 101; 105 Pac. 221; overruling first para-

graph of syllabus in *Missouri Pacific Ry. Co. v. Brinkmeir*, 77 Kan. 14; 93 Pac. 621.

Reasonable diligence to discover defect is all that is necessary to be used has been held in these cases: *Norfolk & W. Ry. Co. v. Hazelrigg*, 170 Fed. 551; *Carson v. Southern Ry. Co.* 68 S. C. 55; 46 S. E. 525; see *St. Louis, I. M. & S. Ry. Co. v. York*, 92 Ark. 554; 123 S. W. 376.

The same degree of diligence is required under the Michigan statute. *Wight v. Michigan Central R. Co.* 161 Mich. 216; 126 N. W. 414; 17 Det. Leg. N. 289, and under the Illinois statute, *Erlinger v. St. Louis & O. Ry. Co.* 152 Ill. App. 640; 245 Ill. 304; 92 N. E. 153.

In the construction of a state statute regulating intrastate cars in terms identical with the Federal statute concerning the duty to equip and keep couplers in repair, the state court will follow the construction placed upon the Federal statute. *Luken v. Lake Shore & M. S. Ry. Co.* 248 Ill. 377; 94 N. E. 175.

of the required equipment was imperfect when the alleged defective cars had, some time previously to the discovery of the defects, been started on their interstate journeys, for there was no evidence whatever as to the effect that the safety appliances were in any wise defective when they began their journey. "The presumption of innocence," said the court, "will leave no room for the inference that the cars were not properly equipped when that journey was begun, especially as no intelligent person can shut his eyes to the fact that the rapid motion, rough jostling and jolting of the trains, and their immense weight may at some time result in injury to such equipment. There cannot be much nicety in the movements of freight trains. The only offenses," continued the court, "imputed to the defendant in these cases is the use of the various cars at the times specified in the pleadings and covered by the evidence. Except these, no other offenses are charged or attempted to be proved. The testimony on behalf of the government shows that nearly every one of the cars had started from the initial point of their respective journeys at least one day, and usually longer, before the inspectors of the United States discovered the defects at some intermediate station. The testimony was very brief, and was directed altogether to what the inspectors then saw. No information was given which might enable the court to determine how long the defect existed. Obviously, under these circumstances, we could not conclude that any defects existed when the car started several days before. We must, on the contrary, presume that the defects were in some way caused during the long previous journey from the initial point to the point of discovery, and therefore, presuming that no violation of the act occurred until after the cars had left the original starting points, and having ascertained from the clear and explicit evidence offered by the United States that defects were found during the subsequent journey, we come to the point where our greatest difficulty begins. We should not lightly suppose that Congress intended, in case a properly equipped car started on its interstate journey with all



the required safety appliances in perfect condition, but some part of which afterwards, in its rough and rapid journey, in some unknown way and at some time when the fact was practically, if not actually, undiscoverable, was broken or otherwise made defective, that the running of that car for the least distance under those circumstances should be held to be a criminal offense. Yet such is the contention for the United States, and it is true that the act, literally construed, would lead to that result and would embrace just such a case. To make crimes out of such inevitable, unavoidable, and unintentional acts, of the happening of which the carrier would usually be unconscious, would obviously be unjust and oppressive, and in a certain sense absurd for that reason. It would be shocking to any well-regulated moral sense to uphold the contention if only an individual citizen were involved, and as we know of no rule that differentiates one sort of person from another in the application of the rules of criminal law, we cannot willingly hold that such was the intention of Congress, even though the language used might literally indicate it. We are not, however, permitted to depart from the words of the act of Congress, or to read exceptions into it, unless upon established principles of interpretation which would authorize it. Some departure from a literal construction may be admissible in this instance; but, if so, we must not only find the principles upon which that course may be justified, but also the points where we may begin and where we must end; and this, we think, has been done in the authorities we have cited. It was insisted on behalf of the government that the statute should be construed with the utmost strictness, and so literally as to make it a criminal offense under the statute if the car was used or operated for one moment, even at night, after the breakage of any part of the required equipment, even though such breakage occurred while the train was in rapid motion between stations, when it was impossible for anybody connected with its operation to ascertain the facts. In short the contention was that the act should be



construed in the strictest and most literal manner, without regard to any other consideration whatever. If this contention be sound, nothing could be simpler, and the government was accordingly content to prove, as it did by two of its inspectors, that they passed alongside of the defendant's trains while at intermediate stations upon the several occasions involved and discovered the defects alleged in the respective paragraphs of the petition, and saw the cars proceed on their journey in that condition. It was also shown that this was done without in any wise informing any of the employes of the defendant of the defects. This was the course pursued in one instance at Fulton, Kentucky, where at least seven separate couplings had been ascertained to be out of repair in one train, although the defects may have endangered the lives of the crew in charge of that train during the trip to its destination, and although several of these defects could have been very easily repaired at that point if their existence had been disclosed. If the inspectors had pointed out the defects, and if those defects had not been repaired before the cars were moved (if under the circumstances that were reasonably possible), the offense would certainly have been complete. And if the repairs had then been made the object of the law would have been accomplished, and the protection of the train hands would have been cared for so far as the safety appliances were concerned. The inspectors, however, seem to have thought it to be their duty to permit defectively equipped cars to move without giving any information that would have enabled the defendant to remove the dangers to the crew by supplying or repairing the defects. On the other hand, it was insisted that the statute should be so construed as not to visit criminal consequences upon a defendant in cases where it had started its cars with the proper equipment, but which, during the journey, had become deficient from unavoidable occurrences and under circumstances, where the discovery of needed repairs was in most instances impossible. It was urged that the construction contended for by the government would lead to gross injustice

and oppression and to the absurd consequences of punishing one for a wholly involuntary act, the doing of which could not be discovered until a greater or less time had elapsed after the offense had been completed. The defendant accordingly, while complaining of the impossibility of being able to show the exact facts at all times in reference to the innumerable couplings and handholds on the vast number of cars hauled, offered evidence tending to show that it had inspected all its cars; that it had not discovered the defects alleged, unless in one or two instances, in which the cars had to be moved short distances in order to reach a point where repairing was possible. And thus we are brought to the question whether, if safety appliances, which are in good condition when the journey of a car on which interstate traffic is being carried begins, afterwards, without the knowledge of the carrier, get broken or otherwise out of repair, it is sufficient proof of the violation of the law to show that fact simply, without showing also that the defendant had learned of the defect or had had reasonable opportunity to do so. Manifestly the act does not contain any words implying that the use of the car without the required safety appliance equipment shall be with intent to violate the statute, or be knowingly and willfully done; nor, indeed, does the language make any exceptions where an unavoidable accident impairs or destroys the operative powers of any of these appliances while the train in which the car is placed is moving on its journey. Speaking generally, the rule is that in such cases we cannot by construction take from nor add to the language used by Congress, but what we are to ascertain in these cases is, not what general rules require, but whether there are any exceptions to those rules, and, if any, what they are. The authorities we have cited seem clearly to show that, if a strict and literal construction would lead to manifest injustice and oppression then the language used should be so construed as to avoid those results. The defendant is a common carrier, engaged in the performance of important duties to the public, involving great and various obligations, to which it is strictly

held. For the most part the several things alleged against it in these cases, were the result of what had occurred while its trains were in motion between stations on its railroad. Those occurrences were practically inevitable in the ordinary operation of its trains. It was impossible to avoid them, or to know of them until long afterwards; and, however it may strike others, in the opinion of this court it would obviously be unjust and oppressive to so construe the Safety Appliance Act or to make such occurrences criminal offenses under its provisions, unless the defendant had reasonable opportunity to learn of them before it afterwards used the car in hauling interstate traffic. For this reason the court readily yields to those rules of construction fixed by the Supreme Court in the cases cited,<sup>7</sup> and by which it can properly construe the acts upon canons of interpretation which justify and demand the limitation of its general language within the bounds we shall indicate. In support of these respective contentions several opinions were cited upon the one side or the other.<sup>8</sup>

\* \* \* While we have been instructed by those cases, we have preferred to look at the question now in litigation from

<sup>7</sup> *Huntington v. Attrill*, 146 U. S. 657; 13 Sup. Ct. Rep. 224; 36 L. Ed. 1123; reversing 70 Md. 191; 2 L. R. A. 779; 14 Am. St. Rep. 344; 16 Atl. Rep. 651; *Johnson v. Southern Pac. Co.* 196 U. S. 1; 25 Sup. Ct. Rep. 162; 49 L. Ed. 363; reversing 54 C. C. A. 508; 117 Fed. Rep. 462; *United States v. Lacher* 134 U. S. 629; 10 Sup. Ct. Rep. 625; 33 L. Ed. 1080; *Carlisle v. United States*, 16 Wall. 153; 21 L. Ed. 426; reversing 6 Ct. Cl. 398; *United States v. Bell Telephone Co.* 159 U. S. 548; 16 Sup. Ct. Rep. 69; 40 L. Ed. 225; *Mottley v. Louisville, etc., R. Co.* 150 Fed. Rep. 406; *The Burdett*, 9 Pet.

690; *Chaffee v. United States*, 18 Wall. 545; 21 L. Ed. 908; reversing Fed. Cas. No. 14,774; *Clyatt v. United States*, 197 U. S. 207; 25 Sup. Ct. Rep. 429; 49 L. Ed. 726; *Kirby v. United States*, 174 U. S. 55; 19 Sup. Ct. Rep. 574; 43 L. Ed. 809; *Agnew v. United States*, 165 U. S. 50; 17 Sup. Ct. Rep. 235; 41 L. Ed. 624.

<sup>8</sup> These were *United States v. Southern Ry. Co.* 135 Fed. Rep. 122; *United States v. Pittsburg, etc., Ry. Co.* 143 Fed. Rep. 360; *United States v. Northern, etc., Co.* 144 Fed. Rep. 861; *United States v. Indiana, etc., R. Co.* 156 Fed. Rep. 565; *United States v. Chicago, etc., R. Co.* 156 Fed.

a point of view somewhat different, and, without going into much elaboration, will state the conclusions reached. It probably in this connection should not be forgotten that the Safety Appliance Act was intended to promote the safety of the very men who are in charge of the trains—men whose duty and interest require them to discover any breakage or defect that might occur; and, if they could not do so, it seems to the court that the literal construction contended for upon the part of the United States would not be a sensible construction, but would work out, probably in most instances, the palpably unjust and oppressive result of inflicting a punishment for an unavoidable act of which the offender was at the time of its commission necessarily unconscious and without any sort of intention of doing a wrong. As Congress must be presumed not to have intended such a result, we should hold that it did not intend to punish the unavoidable and unconscious doing even of an otherwise unlawful act. This view is emphasized by the obvious facts that trains, especially on single-track railroads, could not, without great danger to the traveling public, stop between stations to readjust or put on, for example, a new handhold, or a new pin or clevis, on some car in a freight train, even if the defect were discovered; that in respect to automatic couplers no very great danger to train hands could arise until a point is reached where coupling or uncoupling would be necessary; and that the carrier's duty to the general public should not altogether be forgotten. We cannot resist the conviction that the most urgent insistence upon a literal construction of the statute would balk in a case where a train running at speed between stations in some way broke some part of the safety

180; *United States v. Great, etc., Ry. Co.* 150 Fed. Rep. 229; *United States v. Southern Pac. Co.* 154 Fed. Rep. 897; *United States v. Atchison, etc., Ry. Co.* 150 Fed. Rep. 442; *United States v. St. Louis, etc., R. Co.* 154 Fed. Rep. 516; *Voelker v. Chicago,*

*etc., Ry. Co.* 116 Fed. Rep. 867. "And the same case in the Circuit Court of Appeals. One of these cases, it will be noted was an action for damages by an individual, and the other was for the enforcement of the criminal provisions of the statute."



appliance equipment. The literal interpretation contended for by the counsel for the United States demands, and counsel insists upon, the conclusion that, if the train proceeds at all for any distance (even the shortest) after the break occurs, the offense is complete, and that it is not for the courts to say that an offense has not been committed, but that it is for the executive officers to decide whether the government will overlook the offense or prosecute it. The courts, however, if appealed to, could hardly yield to a view which would exclude them from the function and the duty of passing upon the proper meaning of the act, and determining for themselves whether a person accused was guilty of a public offense; and in the exercise of that duty they can scarcely fail to say that common sense demands some relaxation from a literal construction in the case supposed. If we relax from it at all, we logically surrender it altogether, and thenceforward our labors must be directed to finding the exact point where we may begin and where we may end in order to reach a sensible and just conclusion as to what should be done in such cases. That some relaxation from the literal construction contended for is unavoidable, is clear, and we think we may best interpret the intention of Congress by holding that the carrier should be made liable when it is shown that a safety appliance equipment has become deficient and inoperative after the interstate journey of the car had begun, if it does not supply the deficiency at the first opportunity after it is actually discovered, or after its discovery could have been made by the use of the utmost care that a highly prudent man would use under the circumstances of the case. The determination of the question of that degree of care would, of course, in some instances, depend upon complex conditions; but the necessity for its determination would seem to be unavoidable, unless we are to have a too literal or a too loose construction of the act in applying it to practical affairs in which the great questions of human safety and necessary business are alike involved. This view seems to the court



to approximate as nearly as possible the presumed purpose of Congress to punish intentional or avoidable acts, and not those which were unknown and absolutely unavoidable when they occurred. To impute to Congress an intent to do the latter, would seem to be inadmissible, though we should probably punish in every instance where any deficiency in safety appliances existed when the car was started on the interstate journey. At that point, knowledge of the defect could in most, if not in all, cases be discovered. But, if the operative functions of such appliances become defective during that journey, then punishment as for a criminal offense should only be visited upon the carrier in cases where he, by the use of the utmost degree of diligence which would be used by a highly prudent person under the circumstances, could have discovered and repaired the defect. A less stringent rule should not, we think, be tolerated. Assuming, as we must from the evidence and legal presumptions, that each of the offenses alleged in these cases was committed, if at all, while the car was upon an interstate journey, and not before such journey began, we think the government, in order to be entitled to recover the prescribed penalty for the offense, must by the evidence show to the exclusion of reasonable doubt the following facts: *First*, that the car was used in hauling interstate traffic; *second*, that when so used the car was either not equipped or provided with the required safety appliances at all, or else that some part of those appliances had become inoperative; and, *third*, if, as must be presumed was the case with most of the cars now involved, those appliances were all in good order and condition when the car was originally started on its interstate journey, and afterwards became defective during the transit, then, in order to convict, the evidence must show to the exclusion of reasonable doubt that the alleged defects had respectively been either in fact discovered by the carrier or else that they could have been discovered and corrected by it by the exercise of the utmost degree of care and diligence

which could be expected at the hands of a highly prudent man under similar circumstances.”<sup>9</sup>

**§ 204. Distinction between an action to recover a penalty and to recover damages.**—In a recent case in the Circuit Court of Appeals for the Sixth Circuit a distinction has been drawn between an action to recover damages for an injured employee occasioned by lack of proper equipment and one to recover a penalty for the government, with respect to a car becoming defective during its transit. In a case of a prosecution to recover a penalty the rule is laid down that if the railroad company has used the utmost diligence in having a defect corrected it is excused and not liable to the penalty.<sup>9\*</sup> But it cannot be seriously contended that there is one rule in an action by the government to recover a penalty and another to recover damages to the person.<sup>9a</sup>

**§ 205. Cars in transit—Construction of statute.**—A similar view was taken in another case. Said the court: “The first rule of construction which occurs to us is that we are to have regard to the scope and purpose of the statute, not so much the general purpose, as the immediate purpose of this particular enactment. For, if we look too intently upon some ultimate good we would wish to accomplish, we are very liable to distort the law or make out of it some other enactment than that which the legislature has in fact passed. We think the immediate purpose of Congress in this enactment, in the respect we are now considering it, is that dis-

<sup>9</sup>United States v. Chicago, etc., R. Co. 156 Fed. Rep. 182.

This court proceeded upon an entirely erroneous construction of the statute. It held that the case was a criminal one, when it was a civil one. It held that the case must be proven by the prosecution beyond a reasonable doubt, when a mere preponderance, but clearly showing the violation of the stat-

ute, was sufficient. Just how far it is not the law in view of the recent decisions of the United States Supreme Court, Section 202, it is quite difficult to determine.

<sup>9\*</sup>United States v. Illinois Central R. Co. 170 Fed. 542 (Appendix G).

<sup>9a</sup>Chicago, B. & Q. Ry. Co. 220 U. S. 559; 31 Sup. Ct. 612; 55 L. Ed. —.

closed by its title, wherein it is declared to be 'An act to promote the safety of employes and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, etc. The general purpose is to promote the safety of employes and travelers; but the immediate purpose of the act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplers. The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment. The safety of the employes, etc., is a thing beyond an expected result of the enactment, which latter is the substantive thing before us for interpretation. True, we should have regard to the result intended for it, but we cannot carry into it words foreign to its meaning, or strain those used beyond their fair import.'" "When we come to the enactment itself we find that in the second section it corresponds with what the title has heralded. It forbids the use of cars which have not been equipped with automatic couplers, which are a little more fully defined by adding that they are to be such as will obviate the necessity of going between the cars to uncouple them, or, as we are disposed to think, couple them. And this is all there is of the statute which by direct language imposes the duty upon the carrier in respect to the use of automatic coupling. But it is necessarily implied that the railroad company shall keep up the equipment, for it forbids the use of the cars without it. In this connection it seems proper to refer to the last clause in section 2 which is: 'And which can be uncoupled without the necessity of men going between the ends of the cars.' We understand this to be a part of the description of the type of the automatic couplings with which the cars must be equipped. And further, we may here remark that the coupling with which this car was equipped was of the kind required by the act. Section 6 declares that the use of any car in violation of this provision of the act shall constitute an offense punishable by a fine of \$100. And Section 8 declares that the employe

shall not be deemed to have assumed the risk occasioned by the failure of the railroad company to equip its cars as required by the second section. Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair. One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was fairly necessary to give it place and operation. Now, prior to this enactment, other methods were employed by railroad companies for coupling their cars—generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms, but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employes, Congress enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and, of course, it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute, and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh to impossible. The coupling apparatus on railroad cars is subject at all times while they are being oper-



ated, to almost constant wrench and strain and liability to breakage. Much of the time the cars are connected up in trains running on the time schedules, and under orders of train dispatchers which must be observed, or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as it is contended this statute imposes but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his brief. In such cases if the statute is within the power of the legislature, there is, as the phrase goes, 'no room for construction,' and the business of the court is simply to administer the law as it is written. But this in no wise relieves the court from the duty of construing statutes which are not of that character, but are subject to the amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the consideration of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied; and the singular result is that instead of shading down the express language of an act so that it shall not have an effect which we cannot suppose to have been intended by the legislature, we should by implication infer an



intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then, again, the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action. The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications. In this case we do not think it could be held as matter of law that the railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened.”<sup>10</sup> It is urged that, if

<sup>10</sup> “As we have said, questions have heretofore arisen in the courts upon the construction and application of this statute, among them the question most fully considered here; and there is some conflict in their decisions. In *United States v. Atchison, etc.*, R. Co. 150 Fed. Rep. 442; *Voelker v. Chicago, etc.*, Ry. Co. 116 Fed. Rep. 867; *United States v. Illinois Cent. R. Co.* 156 Fed. Rep. 185; *Elmore v. Seaboard Air Line R. Co.* 130 N. C. 506; 41 S. E. Rep. 786, and *Missouri Pac. Ry. Co. v. Brinkmeier* (Kan.) 93 Pac. Rep. 621; 50 Am. & Eng. R. Cas. 441: similar views in regard to this statute to those we have indicated as our own were expressed. It is proper to observe that the views of Judge Shiras in the *Voelker* case, 116 Fed. Rep. 867, are not there so clearly stated as in his charge to the jury printed in the record of that case, with which we have been supplied. Opposed to

those decisions are the views expressed in *United States v. Southern Ry. Co.* 135 Fed. Rep. 122, by Judge Humphrey; by Judge Whitson in *United States v. Great, etc.*, Ry. Co. 150 Fed. Rep. 229, and possibly for the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, etc.*, Ry. Co. v. *Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 226; 70 L. R. A. 264, where the court was reviewing the ruling of Judge Shiras in 116 Fed. Rep. 867, *supra*. We say ‘possibly,’ because there are several reasons for thinking that the Court of Appeals did not intend to decide anything to the contrary of the construction of the statute which we approve. There were two counts in the petition; one upon the statute, and the other upon the common law liability for negligence. Upon the first count the court below had charged the jury in respect to the statutory liability in accordance with the view we take of it, and

the courts fail to give the statute the construction that it imposes an absolute duty, it defeats the purpose of Congress in enacting it, and leaves the obligation of the carrier as vague as before. But we see no reason for this contention. The benefit of the equipment of the cars with that kind of 'safety appliances' and the maintenance thereof, which, as we think, was the purpose of the law, is secured. The question about which the difference arises is simply whether, in addition to supplying and maintaining the appliances, the carrier is absolutely bound to insure their constant good order, or whether it is bound only to the extent of its best endeavor. The question whether it has fulfilled its duty in the latter respect is no more difficult of determination than such as are constantly arising in cases where negligence is charged in other conditions."<sup>11</sup> But this case was reversed on appeal, and the rule here laid down expressly denied.<sup>11a</sup>

the Circuit Court of Appeals affirmed that ruling. It appears from the report that the railroad company made three points for reversal, neither of which presented the question here presented. The court negatived each of them, and naturally did not go into questions not raised. It reversed the judgment upon another ground. It seems obvious enough that it is not an adverse decision. If we had thought it otherwise, we would have more anxiety about the correctness of our view. Judge Humphrey expressed an adverse opinion, but he finally rested his judgment upon another ground. But Judge Whitson cited Judge Humphrey's opinion, and adopted the view which had been expressed by him but not made the final ground of decision."

<sup>11</sup> St. Louis, etc., R. Co. v. Delk, 158 Fed. Rep. 931; 86 C. C. A. 95; 14 A. & E. Ann. Cas. 233; reversed in 220 U. S. 578; 31 Sup. Ct. 617; 55 L. Ed. —.

If appliances are at hand so that they can be readily made, re-

pairs must be at once made. "But if such means and appliances were not at hand to so remedy the said defects, the defendant would have the right, without incurring the penalty of the law, to have such cars upon which said air brakes so became defective or inoperative hauled to the nearest repair point on its line of railroad where such defects could be repaired and the cars and air brakes put in operative condition; but if such defects existed at a repair point or other place where they could be repaired, as before stated, then if the defendant ran the train from such place when 75 per cent. of the cars therein were not so equipped with operative air brakes as required by law, it is liable for the penalty of \$100 for so running such train." United States v. Chicago, etc., R. Co. 163 Fed. Rep. 775; United States v. Atchison, etc., R. Co. 167 Fed. 696 (Appendix G); United States v. Southern Pac. Co. 167 Fed. 699 (Appendix G).

<sup>11a</sup> See Section 202.

§ 206. **Hauling car to nearest repairing point.**—Much confusion having arisen in the courts, as shown in the succeeding sections, with reference to the duty of a railroad to make immediate repair while cars were in motion or transit, Congress took up the subject in 1910 and enacted a statute covering that and other requirements with reference to the equipment of cars. According to that Act “all cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the top of such ladder.”<sup>11b</sup> By section four of this Act it is provided that if a car has been properly equipped as above stated, “and such equipment shall become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March 2, 1893, as amended by the Act of April 1, 1896,<sup>11c</sup> if such movement is necessary to make such repairs and such repairs cannot be made, except that such repair shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with such equipment which is defective or insecure, or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are

<sup>11b</sup> This statute is set out in full in Appendix D.

<sup>11c</sup> The Safety Appliance Acts.

commercially used, unless such defective cars contain live stock or "perishable freight." As these provisions are in a proviso, the burden is on the railway company to show that it comes within its provisions. If a car becomes defective while in transit, or while not in use in a switchyard, it may be "hailed from the place where" it is "first discovered to be defective or insecure to the nearest available point where such car can be repaired." But if the movement is not necessary to repair it, that is, if the car can be repaired at the place where it is discovered to be out of repair, then it must be repaired there without its being moved. The statute only permits the movement of the defective car when it cannot be repaired at the point of discovery and it is necessary to take it to a repairing point, and that point must be "the nearest available point." In hauling the defective car "to the nearest available point" for repairs it cannot be hauled "by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless" it contains "live stock or 'perishable freight.'" These provisions only excuse the railway company from the penalties inflicted by the Safety Appliance Acts, and does not excuse it "from liability in any remedial action for the death or injury of any railroad employee caused to" him "by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of" the Act of 1910, or the Safety Appliance Acts. This Act of 1910 only applies to defects in the particulars specified in that act and in the Safety Appliance Act; and if the car is defective in other respects—that is, in those parts that the statute makes no reference to—the car may be removed without incurring any penalty, and without any liability to an employee for injuries except such as, under the particular circumstances, the statute imposes. If a car cannot be removed, except with the use of chains, and it cannot be repaired at the point of discovery, then it must be taken



out of the "revenue" train in which it is being hauled, "or in association with other cars that are commercially used," and hauled separately to a repairing point, unless it contain live stock or perishable freight. As the Supreme Court of the United States has held that the Federal Appliance Acts applies to defectively equipped cars hauled in intra-state trains,<sup>11b</sup> it necessarily follows that a car cannot be hauled with chains in such a train to a repairing point unless loaded with live stock or perishable freight. It is also to be observed that a defective car cannot be hauled to a repairing point unless the "movement is necessary to make such repairs and such repairs cannot be made at such repair point." If the repairs can be made at the place where the car becomes defective (or its condition discovered), then it must be repaired there before movement, even if the car be loaded with live stock or perishable freight. Of course, the question will arise whether or not the repairs could have been made at the place where the defect was discovered. If the repairs can there be made, the decisions seem to contemplate it being made while the car is in the train; and to move it for the purpose of putting it on a switch or another track where it could be repaired would seem to be an offense. In one case, decided before this statute of 1910 was enacted, it was held error for the court to say to the jury that a railway company can haul a car to a place to be repaired if *reasonably necessary*.<sup>11c</sup> The courts will perhaps hold that the railway company must make reasonable provisions and use reasonable skill and exertions to repair defective cars at the point where their condition is first discovered, but is not bound to involve

<sup>11b</sup> Section 159.

<sup>11c</sup> *United States v. Southern Pacific Co.* 169 Fed. 407.

That a defective car could be hauled to a repair shop before the enactment of this statute, see *United States v. Rio Grande Western Ry. Co.* 173 Fed. 399; *Chicago*

& N. W. Ry. Co. v. *United States*, 168 Fed. 236; 93 C. C. A. 450; 21 L. R. A. (N. S.) 690.

Under the Illinois statute it is not an offense to take a defective car to a repair shop. *Kelly v. Illinois Central R. Co.* 140 Ill. App. 125.



itself in an unusual expense or use unusual exertions in order to then repair them.<sup>11d</sup>

**§ 207. Destination of car nearer than repair shop.—**

Where the destination of a car was nearer than the repair shops, to which, in order to repair it, it was necessary to take the car, it was held that the company was not bound to take the car to the repair shops to repair its coupler before delivering it at its destination, having it unloaded, and then take it to the shops. "The court thinks that the testimony fails to show beyond a reasonable doubt the existence of every element necessary to constitute the offense alleged in the petition, within the true intent and meaning of the act of Congress, and will, therefore, find and adjudge that the defendant is not guilty as charged in the petition. And any other result would be obviously unjust and oppressive, and not warranted, we think, by any sensible construction of the statute. The only use of the car by the defendant

<sup>11d</sup> Before the enactment of this statute it was said that a "carrier may move one or more cars by themselves to repair shops for the purpose of having them placed in a condition to conform to the Safety Appliance Acts without being guilty of a violation of those acts while it is engaged in an honest effort to meet their requirements." *Chicago & N. W. Ry. Co. v. United States*, 168 Fed. 236; *United States v. Rio Grande W. Ry. Co.* 174 Fed. 399; *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. 423; *United States v. St. Louis, I. M. & S. Ry. Co.* 154 Fed. 516.

A number of the cases hold that they could be removed to the "nearest repair point" in a train with other cars. *United States v. Southern Pacific Co.* 154 Fed. 897; *United States v. Chicago G. W.*

*Ry. Co.* 162 Fed. 775; *United States v. Atchison, T. & S. F. Ry. Co.* Appendix G; *United States v. Atchison, T. & S. F. Ry. Co.* 167 Fed. 696; *United States v. Southern Pacific Co.* 167 Fed. 699; *United States v. Baltimore & O. R. Co.* Appendix G; *United States v. Louisville & N. R. Co.* 156 Fed. 193.

The railway company must have at the repair points materials and facilities necessary to make all repairs, and it must use reasonable foresight in providing the materials and facilities for such purpose. *United States v. Southern Pacific Co.* Appendix G; *United States v. Southern Pacific Co.* 167 Fed. 699; *United States v. Atchison, T. & S. F. Ry. Co.* 167 Fed. 696; *United States v. Atchison, T. & S. F. Ry. Co.* Appendix G.

was to get it as speedily as possible off the busy track and to the place where the defects in the coupling could be supplied. Unloading it at Ewald's<sup>12</sup> was an incident in the accomplishment of this object. No course could well have been more reasonable under the circumstances than the one pursued, and there was no testimony offered by the government tending to show that such defects could practically have been remedied away from repairing points. It was not the case of a handhold merely, as to which the case of putting one on is obvious."<sup>13</sup>

**§ 208. Repairing cars in transit.**—If the couplers are capable of repair, in respect that the law requires, without the necessity of taking them to the repair shops, they must be then repaired "before moving the cars farther upon their journey. I say farther upon their journey, because the cars were yet in transit; the point of destination had not been reached, nor was it reached until they were set in at the place of unloading. The chain coupling, the lock pin with the lever, is a very simple device, consisting of a few links of a small chain, easily attachable with the aid of light tools, and there exists no reason why it should not be readily repaired or replaced at any stage in the journey without serious or material inconvenience or delay. In discussing this phase of the question, Judge Wolverton of the District Court for the District of Oregon said: 'But if I am in error as to the fact of the readiness with which the repairs can be made, then the other phase of the question arises, which is, whether the cars should have been taken to the car shops for repair before being carried on the terminal

<sup>12</sup> The place of its destination, a yard in the same city with the repair shops.

<sup>13</sup> *United States v. Louisville, etc., R. Co.* 156 Fed. Rep. 195. But the government was not required to show the repairs could have been made at the point where

the defect was discovered or was occasioned. The fact that it could not have been there repaired was a burden imposed upon the defendant to show. See *United States v. Illinois Central R. Co.* 170 Fed. 542.

yards for unloading. It is urged that the court should take into consideration the convenience and practicability of repairing the defects. To be understood, it should be said that the term impracticable is not employed in the answer to indicate that it was impossible to set the cars out and take them to the repair shops before carrying them on their journey, but that it was impracticable so to do in the sense that it would unduly impede and interfere with the transportation of freight by cars, and in special instances might result in loss to either the shipper or carrier, or to both, as in the case where perishable goods were being transported. While Congress may have taken into consideration, and presumably did, the inconvenience to railroad companies in providing equipment of the character here under consideration, and in keeping the same in repair, yet by its positive enactment it manifestly considered the safety of the brakeman and employes who are charged with the duty of coupling and uncoupling cars paramount; and, having made no exception in terms, the natural conclusion is that the act was intended to apply in all cases where the cars were being used in moving interstate traffic. Admittedly, if a breakage occurs between stations where repair shops are located, and the repair cannot be made without taking the car to such a place, the company cannot be held liable until it has had the opportunity of making the repair, and in that event it would be justified in hauling the car in the train to the succeeding station where such repairs could be made. This does not, however, give to the company the discretion of carrying the car forward to repair shops at destination. If it were permissible to carry the car by one repair shop to another, where the repair could be more conveniently made, then it could, with equal propriety, be claimed that the car might be carried by and beyond two or more of such stations, and, indeed, to cover an entire journey from the Middle West to the Pacific seaboard. This would detract vitally from the utility of the law, as brakemen might, in the course of such a haul, be required to pass many times between the cars for the coupling and

uncoupling of the particular car or cars with defective equipment. An illustration is afforded by what was done in this case. After the cars were taken into the terminal yards, it was necessary to uncouple them to set them out for unloading and to couple them again for transportation to the Southern Pacific Company's car shops, with possible other couplings and uncouplings to be made. So that the danger to the brakeman continued, and must needs have continued, until relieved by the proper repairs being made. I am constrained to the view, therefore, that this is just the danger that Congress intended to relieve against by the adoption of the act, and that it is what the defendant's duty required it to relieve against by making the repair of the defects prior to taking the cars into the terminal company's yards. The shortness of the haul does not alter the case. We may suppose that a defect existed while the car was being carried from beyond the Dalles, where the Oregon Railway & Navigation Company has repair shops. It would have been a violation of the act for that company to have hauled the cars from the Dalles to Portland without correcting the defect; and so it is, in like manner, a violation of the act for the Southern Pacific Company to take up the cars at East Portland and haul them for the distance of only a half mile, and there deliver them to a company whose duty it is to transact terminal business, where the chief work is in shifting cars from one train to another, and a vast amount of coupling and uncoupling is done, and the greatest danger is present. To hold otherwise would defeat in large measure the paramount purpose and object of the law. The demurrers to the answers should, therefore, be sustained, and it is so ordered." <sup>14</sup>

<sup>14</sup> United States v. Southern Pac. Co. 154 Fed. Rep. 897. See, also, United States v. Atlantic Ry. Co. 153 Fed. Rep. 918; United States v. Atchison, T. & S. F. Ry. Co. 167 Fed. 696; United States v. Southern Pacific Co. 167 Fed. 699;

United States v. Chicago Great Western Ry. Co. 162 Fed. 775; Chicago, M. & St. P. Ry. Co. v. United States, 165 Fed. 423; United States v. Chicago & N. W. Ry. Co. 157 Fed. 616.



§ 209. **Repairs during journey.**—Whenever repairs can be made (or at least can be reasonably made according to the reasoning of some of the cases) during the journey they must be so made; but if they cannot be so made, then they must be done at the nearest repair shop.<sup>15</sup>

§ 210. **Establishing repair shops and material.**—“It is certainly reasonable that a railroad company should be required to maintain shops or repair material and make inspections and repairs at places within reasonable distance of each other; that in establishing such repair points the company has the right, in the ordinary operation of their trains between those repair points, when a train is in operation and defects arise reasonably to carry the car the appliances on which are broken or defective to the first repair point, but they do not have the right, having carried it to that point, to take it beyond that point without discovering and making the necessary repairs to those safety appliances attached to that car, and if they do carry it beyond that point, they are liable to the penalty provided by this law.”<sup>15\*</sup>

§ 211. **Knowledge of defect not an element of the offense.**—It has been held that knowledge of the defective coupling is not an element of the offense. In a charge to the jury, Judge Munger of the United States Court for the District of Nebraska, said: “There is considerable contrariety of opinion between the different courts as to the proper construction of this act. I have reached the conclu-

<sup>15</sup> *United States v. Southern Pac. Ry. Co.* 154 Fed. Rep. 897; *United States v. Chicago, etc., Ry. Co.* 149 Fed. Rep. 486; *Chicago, etc., R. Co. v. King*, 169 Fed. Rep. 372.

<sup>15\*</sup> *United States v. Baltimore, etc., R. Co.* (Appendix G); *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *Chicago, etc., R.*

*Co. v. United States*, 165 Fed. Rep. 423; *United States v. Southern Pac. Co.* 167 Fed. 699 (Appendix G); *United States v. Atchison, T. & S. F. Ry. Co.* 167 Fed. 696; *United States v. Baltimore & O. R. Co.* Appendix G; *United States v. Southern Pacific Co.* Appendix G.



sion that knowledge is not an element of the offense under the statute. The chief purpose of the act of Congress, as pronounced by the various courts that have passed upon it, was the protection of the lives and the safety of the trainmen who have occasion to pass between the cars or to work in and about them, and the act should be construed so as to give this intent full force, if such a construction can be given to the act without doing violence to the language. Any other construction than this requires, not only that the carrier should fail to have the cars properly equipped, but also that the defect should have existed for such a length of time as would reasonably allow the presumption of inspection and notice on the part of the carrier. That interval would then depend upon the verdict of the jury in each instance—in some cases it might exist only for an hour; in other cases it might exist for days, or for a sufficient number of hours to move from one inspecting station on the railway to another inspecting station. This construction of the act concludes that Congress did not intend to protect the lives or provide for the safety of a train crew during such period as the jury should find would be sufficient for the company in the ordinary method of doing business to discover and remedy this defect. This seems to me an unreasonable construction. If the offense that is specifically charged here depends upon its being knowingly committed, it would seem that under each section of this act, in order to render a railway guilty of non-compliance, such an offense should be knowingly committed, and that leads to what seems to me an absurdity. For instance, the fifth section of the act requires that the standard height of the draw bar above the top of the rails is to be fixed at a certain distance, from which distance a maximum variation is allowed. If the act is not violated when there is a variation within that maximum distance then it would appear that if there is an additional variation of another inch, or 2 or 3 inches, not knowingly allowed, and there has been ordinary care and diligence used, no offense is committed under this act. By the same process of reasoning under Section 2 of the amended

act, it would not be a violation of the law to have less than the designated percentage of cars operated by power brakes, but such less percentage must be known to the company.”<sup>16</sup> “While the decision in the case of the United States v. A., T. & S. F. R. R. (D. C.)<sup>17</sup> is to the contrary, yet it seems to me that, Congress having the power to make certain acts an offense regardless of knowledge, and having failed to make knowledge an element by express words in this act, it must have been within the contemplation of Congress that accidents were liable to occur between stations and for some time before repairs could be made, and that, therefore, the failure to include knowledge as an element of the offense must have been present in the mind of the enacting body. Its omission was intentional in order that this statute might induce such a high degree of care and diligence on the part of the railroad company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employes, provided the accident occurs from a defective appliance such as is designated in this act.”<sup>18</sup>

**§ 212. Failure to provide or repair defective handhold.**—A car came into the company's yards without a grab iron on its right hand side of the end on which the brake-

<sup>16</sup> “I find upon an examination of the opinions cited in the argument that there have been decisions by a number of courts, all holding, in effect, that knowledge and diligence are not ingredients of the offense. *United States v. Southern Ry. Co.* (D. C.) 135 Fed. 122; *United States v. C. M. & St. P. Ry. Co.*, 149 Fed. 486; *United States v. G. N. Ry.* (D. C.) 150 Fed. 229; *United States v. S. P. Ry.* (D. C.) 154 Fed. 897; *United States v. Atlantic, etc., Ry.* (decision by Judge Purnell, May 11, 1907) 153 Fed. 918.”

<sup>17</sup> 150 Fed. Rep. 442.

<sup>18</sup> *United States v. Chicago, etc., R. Co.* 156 Fed. Rep. 180. See case under note 6\*. The reasoning of this case is now supported by cases decided in the Supreme Court. See Section 202.

The case of *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918, did not adopt the doctrine of this case; but held that the purpose of the statute was to make the railway company unconditionally liable for a violation of the statute.

staff was located, known as the "B" end.<sup>19</sup> A grab iron had been upon the car. In that condition, on the day of its arrival, the company hauled it to other yards and delivered it to a connecting carrier in that condition. It was loaded during this time with interstate traffic. The company had facilities for repairing it both at its yards and when it inspected it, but failed to put on another grab iron. It was held that the company had violated the statute in not using the proper degree of diligence to make the repairs. It was said that the grab irons were used in the yards where switching was done.<sup>20</sup> Secure grab irons or handholds must be put on the end of a car where they are reasonably necessary in order to afford men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab irons or handhold at that point; but if some other appliance, such as a ladder or brake lever, which afford equal security with the grab irons is there, the statute has not been violated. Having something at that point which performs all the functions of a grab iron is the same as having what is properly called a grab iron there.<sup>20\*</sup>

<sup>19</sup> The opposite end is known as "A" end. This is in accordance with the American Car Builder's rules. If there be two brake-staffs upon the same car, the end toward which the cylinder push rod travels is known as the "B" end.

<sup>20</sup> *United States v. Louisville, etc.*, R. Co. 156 Fed. Rep. 193.

The burden is on the government to show there were no grab irons. *United States v. Boston & M. R. Co.* 168 Fed. 148.

<sup>20\*</sup> *United States v. Boston, etc.*, R. Co. 168 Fed. 148 (Appendix G).

"Grab irons were required for greater safety to men in coupling and uncoupling cars. [*Dawson v. Chicago, R. I. Ry. Co.* 114 Fed. 870.] Then, if the defective car was far remote from the interstate cars in the train, there could be no possible danger from coupling or uncoupling. [This sentence lays

down an erroneous rule in view of the recent decision of the Supreme Court, Section 159.] It seems plain that, if the cars are to be used in connection with each other, they should be in a position to be coupled or uncoupled, so that the danger intended to be avoided, by the act in question, would be imminent in case of the absence of sufficient handholds." *United States v. Illinois Central R. Co.* 166 Fed. 997; *United States v. Chicago & N. W. Ry. Co.* 157 Fed. 616; *United States v. Wabash Terminal Ry. Co.* Appendix G; *Dawson v. Chicago, R. I. & P. Ry. Co.* 114 Fed. 870; *United States v. Boston & M. R. Co.* 168 Fed. 148; Appendix G.

A man coupling the air hose is engaged in coupling the train. *United States v. Boston & M. R. Co.* 168 Fed. 148.

§ 213. Use of "shims"—Common law duty of master not applicable—Fellow servant's neglect—Construction of statute—Hand grips.—In discussing the effect of this statute upon the duty of a railroad to its employes and the use of "shims" to raise and lower the draw bar to the legal height, the Supreme Court of the United States said: "The evidence showed that draw bars which, as originally constructed, are of standard height, were lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called shims, which are metallic wedges of different thickness, are employed to raise and lower draw bars to the legal standard; and that in the caboose of this train the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with draw bars of a standard height, and furnished shims to competent inspectors and trainmen and used reasonable care to keep the draw bars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the draw bar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed,<sup>21</sup> we need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care to furnish his employe reasonably safe tools, machinery and appliances, or consider when and how far that duty may be

As the law does not define a handhold, it is for the jury to determine whether a car is equipped with proper handholds or with such suitable substitutes as will give to the employees greater security in the coupling or uncoupling of cars. *United States v. Baltimore, etc., R. Co.* (Appendix G). See Sections 198, 212.

Where the charge is that the chains connecting the lock pins or lock blocks with the uncoupling lever were out of repair, it is im-

material whether the chains were broken actually in the links or were disconnected. *United States v. Terminal Assn.* (Appendix G). See *United States v. Denver, etc., R. Co.* 163 Fed. Rep. 519.

By the use of defective grab irons, a brakeman injured thereby does not assume the risk thereby incurred. *Coley v. North Carolina R. Co.* 128 N. C. 534; 39 S. E. 43.

<sup>21</sup> Citing *St. Louis, etc., Ry. v. Delk*, 158 Fed. Rep. 931.



performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common law duty of master and servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one and never should be heeded when the hardship would be occasioned and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of the law. But when applied to the case at bar



the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employe and of the public. Where the injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words. We see no error in this part of the case.”<sup>22</sup>

**§ 214. Repairing couplers—Other act of negligence aiding negligence with reference to couplers.**—It is the duty of a railroad company after it has equipped the cars to keep them in repair. It may be negligent in this respect and become liable to the employe. “The statutory requirements,” said Judge Shiras, “with respect to equipping cars with automatic couplers was enacted in order to protect railway employes, as far as possible, from the risks incurring when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the coupler, originally sufficient, to become worn out and inoperative, then the com-

<sup>22</sup> St. Louis, etc., Ry. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616; 52 L. Ed. 1061.

pany is certainly not performing the duty and obligations imposed upon it by the statute and is, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that if it calls upon one of its employes to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that to make the coupling the employe must subject himself to all risks and dangers that inhered in the old and dangerous link-and-pin method of coupling, it is subjecting such employe to the very risk and danger which it is the purpose of the statute to protect him against, so far as it is reasonably possible. Subjecting an employe to risk life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on part of the master is certainly negligence, which will become actionable if injury results therefrom to the employe, and liability therefor cannot be evaded by the plea that if the company was thus guilty of actionable negligence in this particular it cannot be held responsible therefor because it was guilty of another act of negligence which aided in causing the accident.”<sup>23</sup>

**§ 215. Failure to equip train with brakes.**—It is the duty of a railroad company to ascertain at its peril that a train it hauls, whether its own train or one received from another company, over its line of railway, or any part of it, that at least eighty-five per cent of the cars of the train are equipped with air brakes, and if that percentage of its trains be not so equipped, it is liable for a penalty of one hundred dollars because of its hauling such train, the penalty being for hauling the train and not a penalty for each insufficiently equipped car. The eighty-five per cent of the cars composing the train must be so equipped with air brakes that they can be operated by the engineer of the train, and if upon the journey they are reduced below that percentage, then it is the duty of the company to immediately

<sup>23</sup> *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867.

repair the defect or defects and put the air brakes in operative condition as soon as the defects are discovered, or can be discovered by the exercise of reasonable care, at least, on the part of the agents and servants of the company charged with that duty, if the defects can be so repaired by the means and appliances at hand for that purpose when the defects are discovered. If the means and appliances are not at hand to remedy the defects, the company has the right, without incurring the penalty of the law, to haul the defectively equipped car to the nearest point on its line where the defects can be repaired and the air brakes and cars put in operative condition, but if the defects exist at a repair point or other place where they can be repaired, then if the company run its train from that place when eighty-five per cent of the cars in the train are not equipped with operative air brakes it will be liable for the penalty of one hundred dollars for so running the train.<sup>24</sup> In counting the cars in a train to be equipped with air brakes, the engine and tender are to be counted as separate and distinct cars.<sup>25</sup> The Interstate Commission has increased the number of cars to be equipped in any train to eighty-five per cent of the entire number in the train.<sup>26</sup> This statute did not prevent the use of hand brakes before the

<sup>24</sup> *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775.

<sup>25</sup> *United States v. Chesapeake & Ohio R. Co.* (Appendix G).

It must not be forgotten that a failure to equip a train with the requisite number of air brakes is an act of negligence that may give a passenger, or even a traveler crossing the right of way, a right of action.

<sup>26</sup> Order of June 6, 1910. According to this order "all power brakes in cars in every such train which are associated together with the eighty-five per cent. shall have their brakes so used and operated"—"by the engineer of the locomotive drawing such train."

For hand brakes, see Section 193.

The Arkansas statute, requiring three brakemen for freight trains of more than twenty-five cars, operated in the state, is constitutional. *Chicago, R. I. & P. Ry. Co. v. Arkansas*, 222 U. S. —; 31 Sup. Ct. 275; 56 L. Ed. —.

A man coupling or uncoupling the air hose of a train is coupling or uncoupling a train. *United States v. Boston & M. Ry. Co.*, 168 Fed. 148.

Unless a statute requires it, a railroad company is not bound to equip its cars with automatic or air brakes. *Pinson v. Southern Ry. Co.* 85 S. C. 355; 67 S. E. 464.

Act of 1910 requiring them; and evidence that under a general order of a railway company brakemen are required to set hand brakes on trains, was held not sufficient to establish a violation of the statute, there being no claim or evidence that the required percentage of cars were not equipped with power or air brakes. It was also held that it could not be a defense to show that the train had a "sufficient" number of brakes as the first section of the Act of 1893 required, although less than seventy-five per cent, after the Interstate Commission, acting under the Supplemental Act of 1903 had fixed the percentage at seventy-five.<sup>27</sup> The court then proceeds with the remaining question as follows: "It is averred in plaintiff's statement of claim that, while the train had seventy-five per cent of its cars used and operated by the engineer, there were associated together in said train with said seventy-five per cent four additional train brake cars which did not have their brakes operated by the engineer. This charges a breach of the provisions of section two of the Act of March 2, 1903, above quoted. It was admitted at the trial that said four cars were defective and out of repair. It did not appear how long their brakes had been unused. The testimony showed that they had their air 'cut out'—that is, cut off in the pipes extending from the main air line of the train to the brakes. The air was not interfered with in passing through said cars to other cars. It seems plain that with brakes cut out for defects they ceased to be power-braked cars and became part of the allowed percentage of hand-braked cars. The act nowhere imposes a penalty for using an air-braked car with a cut-out brake, as it does for using one with a defective coupler, or one without grabirons or handholds. Again, the act does not say all power-braked cars in a train shall have their brakes used and operated. There is a qualification which must mean that only such power-braked cars 'which are associated together with

<sup>27</sup> "The first section of the Act of 1893 intends that the engineer should control the speed of the

train without requiring brakemen to use the common hand brake for that purpose."



said' seventy-five per cent shall have their brakes used. That clearly contemplated that there might be some power-braked cars not associated with the seventy-five per cent, which need not have their air brakes used and operated. All the cars in the train, except the four cut-out cars, and the caboose, not complained of, were associated together in the air brake operations by the engineer of the locomotive. When the Interstate Commerce Commission shall, in the exercise of its powers, fix a minimum percentage of cars in any train required to be operated with power or train brakes, which must have their brakes used and operated as required by the act, at a minimum much greater than that which now is the standard, there may be some right to recover upon a cause of action in which the allegations and proofs are similar to those in the case at bar." <sup>28</sup>

<sup>28</sup> *United States v. Baltimore & O. Ry. Co.* 176 Fed. 114.

The railroad company is bound to keep the safety brakes in order. *Sherrer v. Banner Rubber Co.* 227 Mo. 347; 126 S. W. 1037.

In order to recover for injuries sustained from the operation of a train not having air brakes, the failure to equip it with air brakes must have been the proximate cause of the injury. *Lyon v. Charleston & W. C. Ry.* 77 S. C. 328; 56 S. E. 18.

A freight train scheduled to run regularly between points in different states is a single train throughout such run and at all times subject to the statute, although some of the cars composing it may have been left and others taken on at different stations, and although after entering the second state the engine, caboose and train crew are changed. *United States v. Chicago Great Western Ry. Co.* 162 Fed. 775.

"The statute does not require all cars which may be equipped with power brakes to be coupled or associated together, but only

fifty [now eighty-five] per cent. of such brakes, but it does require all that may have been equipped with power brakes and actually associated with fifty [now eighty-five] per cent. to be controlled by the engineer from the locomotive. The statute contemplates and allows that there may be cars in the train equipped with air brakes and not associated with the fifty per cent. operated from the engine. The word 'associated,' as here used, manifestly means the cars immediately connected with the fifty [now eighty-five] per cent. equipped with power brakes and operated from the engine; and those associated cars are also required to be operated from the engine. But the terms of the statute not only fail to require all cars of the train to be equipped with air brakes to be operated from the engine, but impliedly excludes such requirement, by expressing the requirement that the cars when associated with the minimum number of cars shall be so equipped." *Lyon v. Charleston & W. C. Ry. Co.* 77 S. C. 328; 56 S. E. 18.



## CHAPTER XIII.

### NEGLIGENT INJURY.

#### SECTION

- 216. Use of car without automatic coupler is negligence *per se*.
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- 218. Who may bring actions to recover damages—What employees are engaged in interstate commerce.
- 219. Proximate cause of injury.
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#### SECTION

- 222. Contributory negligence does not defeat the action.
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§ 216. Use of car without automatic couplers is negligence *per se*.—The use of a car in interstate commerce without automatic couplers is negligence *per se*.<sup>1</sup>

§ 217. Failure to equip car a continuing negligence.—A failure to properly equip a car with automatic brakes used in interstate commerce is a continuing negligence, making the railway company liable for an injury to an employee while making a coupling in the discharge of his duty.<sup>2</sup>

<sup>1</sup>Winkler v. Philadelphia, etc., R. Co. 4 Penn. (Del.) 80; 53 Atl. Rep. 90; affirmed 4 Penn. (Del.) 387; 56 Atl. Rep. 112; Voelker v. Chicago, etc., Ry. Co. 116 Fed. Rep. 867. See also Southern Ry. Co. v. Carson, 194 U. S. 130.

<sup>2</sup>Fleming v. Southern Ry. Co. 131 N. C. 476; 42 S. E. Rep. 905; Elmore v. Seaboard, etc., Ry. Co. 132 N. C. 865; 44 S. E. Rep. 620; Greenlee v. Southern Ry. Co. 122 N. C. 977; 30 S. E. Rep. 115; 11

Am. & Eng. R. Cas. (N. S.) 45; 41 L. R. A. 399; 65 Am. St. Rep. 734 (no statute relied upon); Mason v. Railroad Co. 111 N. C. 482; 16 S. E. Rep. 698; Whitsell v. Railroad Co. 120 N. C. 557; 27 S. E. Rep. 125; Troxler v. Southern Ry. Co. 124 N. C. 191; 32 S. E. Rep. 550; 44 L. R. A. 312; 70 Am. St. Rep. 580.

The obligation to equip its cars cannot be evaded by assigning the duty to an employee of the com-

§ 218. **Who may bring action to recover damages—What employees are engaged in interstate commerce.**—It is of importance to know who may bring an action to recover damages occasioned him by the neglect of a railway company to properly equip its cars with automatic couplers and maintain them in repair, and also with other devices specified by the statute. In one case it was said, though the point was not before the court, "though the Safety Appliance Law is primarily in the interest of employees in interstate commerce, its protection is not limited to them, but extends to all persons who without fault are injured in person or property by reason of the railroad's failure to provide the statutory safeguards."<sup>2a</sup> This is certainly true, even as to persons who are passengers or property carried as freight; but the failure to equip the car properly, to render the railway company liable in this respect, must be the proximate cause of the injury. Thus, merely because an employee is injured by a collision of trains and the cars in the trains, or some of them, were not properly equipped, will not of itself render the company liable.<sup>2b</sup> To recover in such an instance the liability must be put upon other grounds. Of course, any servant engaged in interstate commerce, or engaged upon a railroad that is "a highway of interstate commerce," though injured, it would seem, by intrastate improperly equipped cars not even moving in an interstate train, is within the protection of the statute. Thus an employee charged with the duty of seeing to the coupling of the cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another car, was held to be employed in interstate commerce, and

pany. Thus, the act of a conductor in charge of a train in deciding what shall be done with a defective car is the act of the company; and the negligence of the engineer cannot be resorted to in order to excuse the company from liability occasioned by a de-

fective coupler and his negligence. *Chicago, etc., R. Co. v. King*, 169 Fed. Rep. 372 (decided February 3, 1909).

<sup>2a</sup> *Atchison, T. & S. F. Ry. Co. v. United States*, 172 Fed. 194.

<sup>2b</sup> *Campbell v. Spokane & I. El. R. Co.* 188 Fed. 516.

could avail himself of the provisions of the Safety Appliance Act.<sup>2c</sup> So a car repairer, injured by a car standing upon a switch.<sup>2d</sup>

§ 219. Proximate cause of injury.—In order to enable an employe to recover where he has been injured by a car not properly equipped with automatic couplers, such improper equipment, or the absence of an automatic coupler, must have been the proximate cause of his injury; and he has the burden to show that such was the fact.<sup>3</sup> But the failure to equip a car as the statute requires, by reason of which an employe is obliged to go between cars where he is injured is the proximate cause of the accident, although the cars were forced together by the negligent kicking of the other cars against them.<sup>4</sup> The absence of a proper coupling must

<sup>2c</sup> *Johnson v. Great Northern Ry. Co.* 178 Fed. 643.

<sup>2d</sup> *Erie R. Co. v. Russell*, 183 Fed. 722; 106 C. C. A. 160.

This phase of the question has been discussed somewhat at length in the first part of this work. See, also, *Chicago, etc., R. Co. v. King*, 169 Fed. 372; Appendix G.

As to an employee loading railroad iron coming within the Act of 1908, see *Tamura v. Great Northern Ry. Co.* 58 Wash. 316; 108 Pac. 774.

As to a track walker under that Act, see *Colasurdo v. Central R. of New Jersey*, 180 Fed. 832.

<sup>3</sup> *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867 (injury caused while attempting to adjust a coupler); *Crawford v. New York, etc., R. Co.* 10 Amer. Neg. Cas. 166; *Donegan v. Baltimore, etc., R. Co.* 165 Fed. Rep. 869; *Chicago, etc., R. Co. v. King*, 169 Fed. Rep. 372 (decided February 3, 1909), injury occasioned while trying to put on a new knuckle.

The question whether the defec-

tive coupler was the proximate cause of the plaintiff's injury must be submitted to the jury. *Erie R. Co. v. Russell*, 183 Fed. 722.

Where the defendant cut off the pilot on an engine so that it was known as a "stub pilot" in order to comply with the Safety Appliance Act in putting an automatic coupler on the front end of the locomotive, and the locomotive turned over and killed its servant, it was held that the Act did not apply to such an instance, although it was claimed that it turned over because of the condition of the pilot. *Briggs v. Chicago & N. W. Ry. Co.* 125 Fed. 745.

<sup>4</sup> *Voelker v. Chicago, etc., Ry. Co. supra*; *York v. St. Louis, I. M. & S. Ry. Co.* 86 Ark. 244; 110 S. W. 803; *Sprague v. Wisconsin Central R. Co.* 104 Minn. 58; 116 N. W. 104; *Turrittin v. Chicago, St. P., M. & O. R. Co.* 95 Minn. 408; 104 N. W. 225.

Where a coupler was defective, and the plaintiff went between the cars and attempted to pull the

have been the cause of the injury before a recovery can be had for a failure to comply with the statute.<sup>5</sup> But that the deceased employe was engaged in coupling cars at the time of his death, that the cars were not provided with automatic couplers, and that the intestate's death was caused by the old-fashioned coupler's slipping by one another, make out a *prima facie* case of negligence.<sup>6</sup> It should be noted

coupling pin by hand, but not succeeding started out when his foot caught in an unblocked switch frog and he was injured, it was held to be a question for the jury whether the defective coupler was the cause of the injury. *Donegan v. B. & N. Y. Ry. Co.* 165 Fed. 869.

The statute does not apply to an employee injured in a collision. *Campbell v. Spokane & I. E. R. Co.* 188 Fed. 516.

<sup>5</sup> *Elmore v. Seaboard, etc., Ry. Co.* 132 N. C. 865; 44 S. E. Rep. 620; 131 N. C. 569; 42 S. E. Rep. 989; *Greenlee v. Southern Ry. Co.* 122 N. C. 977; 30 S. E. 115; *Troxler v. Southern Ry. Co.* 124 N. C. 189; 32 S. E. 550; *Mason v. Richmond & D. R. Co.* 111 N. C. 482; 16 S. E. 698; *Elmore v. Seaboard Air Line Ry. Co.* 130 N. C. 205; 41 S. E. 786; *Southern Ry. Co. v. Carson*, 194 U. S. 136; 24 Sup. Ct. 609; 48 L. Ed. —. Nearly all the cases now hold that an action by the government to recover a penalty under this statute is a civil action. *United States v. Baltimore, etc., R. Co.* (Appendix G); *United States v. Terminal, etc.* (Appendix G, p. 325); *United States v. Nevada County, etc., R. Co.* 167 Fed. 695 (Appendix G); *United States v. Chicago, etc., R. Co.* (Appendix G); *United States*

*v. Denver, etc., R. Co.* 163 Fed. Rep. 519; *United States v. Chesapeake, etc., R. Co.* (Appendix G); *United States v. Louisville, etc., R. Co.* 162 Fed. Rep. 185; *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v. Lehigh Valley R. Co.* 162 Fed. Rep. 410; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 403; *United States v. Pennsylvania R. Co.* 162 Fed. Rep. 408; *United States v. Philadelphia, etc., R. Co.* 162 Fed. Rep. 405; *United States v. Atlantic Coast Line R. Co.* (Appendix G); *Atlantic Coast Line R. Co. v. United States*, 168 Fed. Rep. 175 (decided March 1, 1909); *Wabash Ry. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *United States v. Southern Ry. Co.* 167 Fed. 699, Appendix G.

<sup>6</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395. A brakeman was directed to cut off the two rear cars while the train was moving slowly and before it reached a certain switch. The coupler being broken, he went between the cars and attempted to pull the pin by hand, but, not succeeding, started out when his foot was caught in an unblocked switch frog and he was injured. It was held that the question whether the failure of the defendant to have the car properly equipped was the proximate cause



that there is nothing in the statute that limits the class of persons to whom the carrier shall be responsible for damages that result directly and immediately from a failure to comply with its provisions.<sup>6\*</sup> "Though the Safety Appliance Law is primarily in the interest of employees in interstate commerce, its protection is not limited to them, but extends to all persons who without fault are injured in person or property by reason of the railroad's failure to provide the statutory safeguards," namely, grabirons.<sup>6a</sup>

§ 220. **Assumption of risk.**—By undertaking to couple a car used in interstate commerce that has not been provided with such couplings as that statute requires, the employe does not assume the risk of making the coupling. If not equipped as the act of Congress requires, "the plaintiff did not assume the risk therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge."<sup>7</sup> But the usual rules

of the injury, so as to render it liable under the Safety Appliance Act was one of fact for the jury, and that it was error for the court to direct a verdict for the defendant. *Donegan v. Baltimore, etc., R. Co.* 165 Fed. Rep. 869.

<sup>6\*</sup> *Chicago, etc., R. Co. v. King*, 169 Fed. Rep. 372 (decided February 3, 1909).

<sup>6a</sup> *Atchison, T. & S. F. Ry. Co. v. United States*, 172 Fed. 194.

Failure to equip a train with air brakes must be the proximate cause of his injury to allow a servant of the company to recover damages for such injury. *Lyon v. Charleston & W. C. Ry.* 77 S. C. 928; 56 S. E. 18.

Where an employee was standing on the running board of a locomotive, and the train, not being equipped with air brakes, separated, which it would not have done if it had been equipped with them; and

when the two sections of the train came together he was injured by their impact, it was held that the proximate cause of the injury was the failure to equip the train with air brakes. *Blackburn v. Cherokee Lumber Co.* 152 N. C. 361; 67 S. E. 915.

<sup>7</sup> *Winkler v. Philadelphia, etc., Ry. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; affirmed, 4 Penn. (Del.) 387; 56 Atl. Rep. 112; *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *St. Louis, I. M. & S. Ry. Co. v. Neal*, 71 Ark. 445; 78 S. W. 220; *York v. St. Louis, I. M. & S. R. Co.* 86 Ark. 244; 110 S. W. 803; *Atlantic Coast Line R. Co. v. United States*, 168 Fed. 175; *Texas & P. Ry. Co. v. Swearingen*, 122 Fed. 193; *Norfolk & W. R. Co. v. Hazelrigg*, 170 Fed. 551;



concerning the duties of a master to supply safe places for the servant apply; and the servant assumes the risks incident to his employment. By soliciting work he represents that he is competent to perform the work solicited.<sup>8</sup> Upon this question the Supreme Court has made the following observations: "It is enacted by Section 8 of the act that any employe, injured by any car in use contrary to the provisions of the act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase 'assumption of risk' was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well known case of *Farwell v. Boston & Worcester R. R. Co.*<sup>9</sup> But, at the present time, the notion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and

*Johnson v. Great Northern Ry. Co.* 178 Fed. 643; *Luken v. Lake Shore & M. S. Ry. Co.* 248 Ill. 377; 94 N. E. 175 (Illinois statute); *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495; *Plummer v. Northern Pacific Ry. Co.*, 152 Fed. 206; *United States v. Atlantic Coast Line R. Co.* 153 Fed. 918;

*Coley v. North Carolina R. Co.* 129 N. C. 422; 40 S. E. 195; 57 L. R. A. 817; *Denver & R. G. R. Co. v. Gannon*, 40 Colo. 195; 90 Pac. 853.

<sup>8</sup> *Winkler v. Philadelphia*, 4 Penn. (Del.) 80; 53 Atl. Rep. 90; *Malott v. Hood*, 201 Ill. 202; 66 N. E. Rep. 247; 99 Ill. App. 360.

<sup>9</sup> 4 Met. 49.

by statutes like Section 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist. Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended or foreseen. He is held to assume the risk upon the same ground.<sup>10</sup> Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's right will be sacrificed by simply charging him with assumption of risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as controvertible terms.<sup>11</sup> We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound. To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep

<sup>10</sup> Choctaw, Oklahoma & Gulf R. Ed. 207; affirming 52 C. C. A. R. Co. v. McDade, 191 U. S. 64, 260; 114 Fed. Rep. 458.  
<sup>11</sup> 68; 24 Sup. Ct. Rep. 102; 48 L.

his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the Supreme Court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employe takes the risk even of unusual dangers, if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with the full knowledge of the danger, and to imply that the defendant was guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel car was not a car within the meaning of Section 2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was. It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide, but desiring to live, is said to be chargeable with

<sup>11</sup> *Patterson v. Pittsburg & Con-  
nellsville R. R. Co.* 76 Pa. St. 389.

negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy draw bar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed."<sup>12</sup> The provisions of this statute cannot, however, be applied to an instance of "kicking" cars onto a switch.<sup>13</sup> A switchman engaged in handling a freight car having a defective coupler, on a track which is principally used for handling freight trains, although occasionally cars are brought upon the track for repairs, does not assume the risk arising from the defect in such coupler, when he is not engaged in moving the car as one in bad order with a view to its isolation or repair.<sup>14</sup>

<sup>12</sup> *Schlemmer v. Buffalo, etc., R. Co.* 205 U. S. 1; 28 Sup. Ct. Rep. 616; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

This case was again tried and the plaintiff defeated. It was affirmed on appeal. *Schlemmer v. Buffalo, etc., R. Co.* 222 Pa. 470; 71 Atl. 1053; and on appeal to the Supreme Court of the United States the case was again affirmed on the ground of contributory negligence in the deceased. *Schlemmer v. Buffalo, R. & P. Ry. Co.* 220 U. S. 590; 31 Sup. Ct. 561; 55 L. Ed. 596.

<sup>13</sup> *Chicago, etc., Ry. Co. v. Voelker*, 129 Fed. Rep. 522; 65 C. C. A. 65; 70 L. R. A. 264; reversing

116 Fed. Rep. 867. This is the only point upon which this case was reversed: on all other points the first decision is an authority.

<sup>14</sup> *Chicago, etc., R. Co. v. Voelker, supra*. "It cannot be assumed that by the passage of a salutary law designed for the protection of those engaged in hazardous occupations, Congress intended to offer a premium for carelessness or to grant immunity from the consequences of negligence. The reasonable conclusion is that the defense of contributory negligence is as available to a railroad company after as before the passage of the act of Congress, although it has not complied with



§ 221. **Contributory negligence of plaintiff.**—While an employee of a railroad does not assume the risk in coupling a car not equipped with automatic couplers, yet if he had been guilty of negligence contributing to his injuries it has been held he could not recover. If, in “using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful. In such a case he must take the consequence of his own contributory negligence.” “It is the duty of the servant, as well as the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore, if the plaintiff contributed to the accident by his own negligence he cannot recover.”<sup>15</sup> It is not contributory negligence, however, in the employee to attempt to couple or uncouple a car not equipped as the act of Congress requires; and he may recover if he does if his injuries “resulted from such unlawful use alone.”<sup>16</sup> For an employee to remain in the railway company’s service, knowing that the cars had not been equipped with automatic couplers, is not contributory negligence.<sup>17</sup> The employee must use ordinary care to avoid an injury.<sup>18</sup> If the

its requirements.” *Denver, etc., R. Co. v. Arrighi*, 129 Fed. Rep. 347. The Government is entitled to recover the statutory penalty under all circumstances where an injured employee has, under the statute, the benefit of denial of assumption of risk. *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918.

The Safety Appliance Act would be honored only in their breach if the same facts that would defeat the employee under the common-law rule of assumed risk can be used to defeat him under the name of contributory negligence. *Chicago, etc., R. Co. v. King*, 168 Fed.

Rep. 372 (decided February 3, 1909).

<sup>15</sup> *Winkler v. Philadelphia, etc., R. Co.* 4 Penn. (Del.) 80; 53 Atl. Rep. 90; affirmed 4 Penn. (Del.) 387; 56 Atl. Rep. 112; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *Voelker v. Chicago, etc., Ry. Co.* 116 Fed. Rep. 867; *Denver, etc., R. Co. v. Arrighi*, 129 Fed. Rep. 347.

<sup>16</sup> *Winkler v. Philadelphia, etc., R. Co. supra.*

<sup>17</sup> *Elmore v. Seaboard, etc., Ry. Co.* 132 N. C. 865; 44 S. E. Rep. 620; 131 N. C. 569; 42 S. E. Rep. 989.

<sup>18</sup> *Cleveland, etc., Ry. Co. v. Curtis*, 134 Ill. App. 565.



servant could have coupled the cars more safely from the one side of the car than another, he must do so, if he could have done the work as well by going in on the safe side.<sup>19</sup> If the rules of the company require him to use a stick in coupling, he must do so if practicable; but if not practicable, he need not do so, as where the coupler weighed 120 pounds and was six feet long.<sup>20</sup> In one case it was said that "The devolution of this duty upon the carriers [to equip their cars with automatic brakes] necessarily imposed upon their servants the correlative duty of using the equipment thus furnished to them, and of refraining from going between the ends of the cars to couple or uncouple them unless compelled to do so by necessity."<sup>20a</sup> And it was held that if the couplers were in order the servant must use them, and if he did not, and was injured in coupling the cars equipped with them he was guilty of such contributory negligence

<sup>19</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395.

<sup>20</sup> *Fleming v. Southern Ry. Co.* 131 N. C. 476; 42 S. E. Rep. 905.

In this case it was also held that the employee could recover, although he was guilty of contributory negligence.

The plaintiff's knowledge of the physical conditions cannot be charged against him in determining the quality of his conduct in going and being between the cars when he was injured. *Chicago, etc., R. Co. v. King*, 169 Fed. Rep. 372 (decided February 3, 1909).

There are a number of cases to the same effect, which we cite. *Schlemmer v. Buffalo, R. & P. Ry. Co.* 220 U. S. 590; 31 Sup. Ct. 561; 55 L. Ed. 596; affirming 222 Pa. 470; 71 Atl. 1053; *Suttle v. Choctaw, O. & G. R. Co.* 144 Fed. 668; 75 C. C. A. 470; *Union Pacific R. Co. v. Brady*, 161 Fed. 719; *Morris v. Duluth, S. S. & A. Ry.*

*Co.* 108 Fed. 717; *Donegan v. Baltimore & N. Y. R. Ry. Co.* 165 Fed. 869; *York v. St. Louis, I. M. & S. Ry. Co.* 86 Ark. 244; 110 S. W. 803; *Sprague v. Wisconsin Central R. Co.* 104 Minn. 58; 116 N. W. 104; *Turretin v. Chicago, St. P., M. & O. Ry. Co.* 95 Minn. 408; 104 N. W. 225; *St. Louis, I. M. & S. Ry. Co. v. York*, 92 Ark. 554; 123 S. W. 376; *Cleveland, C. C. & St. L. Ry. Co. v. Baker*, 91 Fed. 224; *Johnson v. Great Northern Ry. Co.* 178 Fed. 643; *Toledo, St. L. & W. R. Co. v. Gordon*, 177 Fed. 152; *Siegel v. N. Y. Central R.* 178 Fed. 873; *Norfolk & W. R. Co. v. Hazelrigg*, 184 Fed. 828; *Chicago, R. I. & P. Ry. Co. v. Brown*, 185 Fed. 80; *Gilbert v. Burlington, C. R. & N. Ry. Co.* 128 Fed. 529; 63 C. C. A. 27.

<sup>20a</sup> *Gilbert v. Burlington, C. R. & N. Ry. Co.* 128 Fed. 529; 63 C. C. A. 27. See also *Suttle v. Choctaw, O. & G. R. Co.* 144 Fed. 668; 75 C. C. A. 470.

as prevented his recovering damages because of his injuries received in making the coupling of the cars so equipped. And while it is the duty of a railway company to equip its cars so they can be coupled from both sides of them without the necessity of going between them, yet if one side be not so equipped and the other is, he must go to the other side to make the coupling; and he cannot be heard to say it was dangerous to cross the tracks between the cars when the engineer is subject to his directions in moving the cars.<sup>20b</sup> In an action by a brakeman to recover damages for an injury received while uncoupling cars, one of which was being moved with a defective coupler, it was held error for the court to give a general instruction as to the effect of contributory negligence when the cars could have been uncoupled from the other side of the train without the necessity of going between them as the plaintiff did. The defendant asked that the court charge the jury that if they "believe and find from the evidence that, at the time and upon the occasion of receiving the injuries sued for, the plaintiff was himself negligent, and by his own negligence contributed to the injuries sustained by him and sued for herein, and that, but for such negligence upon the part of the plaintiff, if any there was, such injury could not have happened to or been sustained by him," then they must find for the defendant. The court refused to give this instruction and did not give another covering it; and this was held erroneous.<sup>20c</sup> Upon a second trial a judgment was again given for the plaintiff; and this was affirmed on appeal, the court holding the brakeman being inexperienced and was doing switching work in the defendant's railroad yards in weighing cars which were required to be

<sup>20b</sup> Union Pacific R. Co. v. Brady, 161 Fed. 719; 88 C. C. A. 579; Morris v. Duluth, S. S. & A. Ry. Co. 108 Fed. 747; 47 C. C. A. 661; Norfolk & W. R. Co. v. Hazelrigg, 170 Fed. 551; Gilbert v. Burlington, C. R. & N. R. Co. 128

Fed. 529; 63 C. C. A. 27; Suttle v. Choctaw, O. & G. R. Co. 144 Fed. 668; 75 C. C. A. 470.

<sup>20c</sup> Norfolk & W. Ry. Co. v. Hazelrigg, 170 Fed. 551; 95 C. C. A. 637.

uncoupled as they were weighed, and who, when the lever on a car on the side of train where he was working would not uncouple two cars because of a defect, went between the cars as he had seen others do, and was injured, cannot be held chargeable as a matter of law with contributory negligence, because he did not go around the train and try the lever on the other side; and whether or not he was chargeable with contributory negligence in going between the cars to uncouple them, whereby he was injured, was a question for the jury, who might take into consideration his knowledge and experience in the work. The plaintiff testified that he did not know there was a lever on the other side of the connecting car, as there was.<sup>20d</sup> Where a brakeman went between the cars to get to the other side to couple the cars with a lever when he could have gone across the

<sup>20d</sup> *Norfolk & W. R. Co. v. Hazelrigg*, 184 Fed. 828. The court cites *Blumenthal v. Craig*, 81 Fed. 320; 26 C. C. A. 427; *George v. Clark*, 85 Fed. 608; 20 C. C. A. 274; *Wheeler v. Oak Harbor Head Lining & Hoop Co.* 126 Fed. 348; 61 C. C. A. 250; and *Michigan Headling & Hoop Co. v. Wheeler*, 141 Fed. 61; 72 C. C. A. 71, upon the question of the youthfulness or inexperience of the plaintiff. The court reviewed the cases cited above before a discussion of the case in hand was herein assumed, as follows: "In the *Morris*, *Gilbert* and *Suttle* cases it was held that the act of the brakeman in going between the cars instead of using the lever on the opposite side was negligence as matter of law. The *Brady* case is in harmony with the other three cases. We think the case before us is readily distinguishable upon its facts from each of the four cases cited. In the *Morris* case the injured employee was the head brakeman of a crew of employees. He stepped between

moving cars in the dark. The lever on the opposite side was in working order. In the *Gilbert* case the plaintiff was head brakeman of the switching crew, and was directing the movements of the train. He likewise stepped between moving cars. The couplers on both sides were in good working order, but the one on his side could not be pulled because the 'slack was tight.' In the *Suttle* case the lever on the brakeman's side was temporarily disconnected, but the one on the other side was all right, and the brakeman could have reached and drawn the pin in safety by going on the platform of the caboose. Instead of doing so, he went between moving cars in the night-time. In the *Brady* case plaintiff was foreman of the switching crew, and had had twelve years' experience as brakeman, switchman, and yardmaster. He knew it was not uncommon for a coupling appliance to require several jerks of the lever to uncouple. While he was between the cars

caboose platform; and in going across the tracks he stumbled, fell and was run over and killed, it was held that there could be no recovery for his death. At the time of crossing the cars were moving together.<sup>20e</sup> A coupler was defective, and the plaintiff went between the cars and attempted to pull the pin by hand, but not succeeding, started out when his foot caught in an unblocked switch frog and he was injured. It was held to be a question for the jury if the defective coupler caused the injury, and if the plaintiff were guilty of contributory negligence.<sup>20f</sup> Where a switchman put his hand between cars and moved along with them in uncoupling, it was held that he was not guilty of contributory negligence, the safety coupling being out of order, though he could have avoided the resultant injury by waiting until the cars stopped. There were twelve cars in a string, and there was no way practically open to the switchman to go around to the opposite side. The operation of uncoupling was to be done while the train was moving, and there was no opportunity to stop the train. When he received his injuries he could not have reached the pin lifting the rod on the adjacent car, projecting on the opposite side of the train, as readily as he could reach the

after dark, the cars were moved through the negligence of a fellow servant."

The court approved this instruction:

"The question, then, is whether or not a brakeman of ordinary care and prudence, with such experience as plaintiff in this case had, and with such knowledge of railroading as he had, and under existing conditions—*i. e.*, under like circumstances—would or not have appreciated the danger of going in between those cars, and have refrained from going in between them, and, instead of doing so, would have called over to the conductor to operate the lever on his

side, or himself have gone around and operated that lever or otherwise acted. If you believe from the evidence that a brakeman of ordinary care and prudence, under like circumstances, would have appreciated that danger, and would not have gone in between those cars, but would have called across to the conductor, or would have gone around and pulled the other lever himself, or acted otherwise than going between the cars, there can be no recovery in this case."

<sup>20e</sup> *Suttle v. Choctaw, O. & G. R. Co.* 144 Fed. 668; 75 C. C. A. 470.

<sup>20f</sup> *Donegan v. Baltimore & N. Y. R. Co.* 165 Fed. 869.



pin itself. The court considered that he was compelled to do as he did "by necessity" within the meaning of the quotation above set forth.<sup>203</sup> "In our judgment, 'the necessity' existed in the case under consideration; for in large yards, where safety appliances refuse to work, to let the cars go uncoupled under the circumstances disclosed here, might result in blocking the operation of the whole road. There is nothing in the facts before us that show that the defendant in error [the plaintiff] might, without violating his duty or doing injury to the road, have stopped the operation of the train until he could have gone around on the other side.

"Nor can we believe that the interpretation put upon this Act, in the part just quoted from the opinion in *Gilbert v. B. C. R. & N. R. Co.*, is the one intended by Congress. To our minds, the act was intended, not to increase the difficulty of getting compensation for injuries sustained, but to decrease the number of cases in which injuries would happen. It abolishes, in terms, assumption of risk. And where there exists a practical necessity, such as confronted this switchman, to uncouple the cars by some means other than the defective lever, what is done is assumption of risk. Putting his arm between the cars, under such circumstances, and traveling with them, is not *per se* contributory negligence. If there be contributory negligence at all, it depends, not upon his assuming the risk under the circumstances disclosed, but upon the degree of care with which he acts while in the performance of the work under the assumed risk; and that question, we think, all things considered, was fairly submitted to the jury in the instruction of the court."<sup>204</sup>

Where a brakeman was ordered to make a coupling with a coupler that had been out of order for five months, to the railroad company's knowledge, and he was injured in

<sup>203</sup>*Gilbert v. Burlington, C. R. & N. Ry. Co.* 128 Fed. 529; 63 C. C. A. 27.

<sup>204</sup>*Chicago, R. I. & P. Ry. Co. v. Brown*, 185 Fed. 80.



obeying the order, it was held that he was not guilty of contributory negligence.<sup>201</sup> An experienced brakeman, having been in service fifteen or sixteen years, undertook to couple a shovel car, having an iron drawbar, weighing about eighty pounds, and protruding beyond the end of the shovel car. The end of this drawbar had a small opening, or eye, into which an iron pin was to be fitted when the coupling was made; this was to be affected by placing the end of the drawbar into the slot of the automatic coupler with which the caboose was equipped. Owing to the difference in height, the end of the shovel car would pass over the automatic coupler on the caboose in case of an unsuccessful attempt to make the coupling; and the end of the shovel car would come in contact with the end of the caboose. At the time when he undertook to couple the train with the shovel car to the end of the caboose, he went under the end of the shovel car, and attempted to raise the iron bar so as to cause it to fit into the slot of the automatic coupler on the caboose. While so doing, his head was caught between the ends of the shovel car and the caboose, and he was almost instantly killed. The situation was plainly observable. It was held that there could be no recovery for his death. He was twice expressly cautioned at the time as to the danger of doing as he did.<sup>202</sup>

<sup>201</sup> *Elmore v. Seaboard Air Line Ry. Co.* 130 N. C. 506; 41 S. E. 786.

<sup>202</sup> *Schlemmer v. Buffalo, R. & P. Ry. Co.* 222 Pa. 470; 71 Atl. 1053; affirmed 220 U. S. 590; 31 Sup. Ct. 561; 55 L. Ed. —. A like holding was had on the first appeal, 207 Pa. 198; 56 Atl. 417, but the case was reversed by the United States Supreme Court. 205 U. S. 1; 27 Sup. Ct. 407; 51 L. Ed. 681.

For a case holding it contributory negligence not to go to the other side of a car where a lever

could be worked, see *St. Louis, I. M. & S. Ry. Co. v. York*, 92 Ark. 554; 123 S. W. 376.

If the coupling be out of working order, then it is not contributory negligence to go between the cars to couple them. *Sprague v. Wisconsin Central R. Co.* 104 Minn. 58; 116 N. W. 104; *Turretin v. Chicago, St. P. M. & O. R. Co.* 95 Minn. 408; 104 N. W. 225; *York v. St. Louis, I. M. & S. Ry. Co.* 86 Ark. 244; 110 S. W. 803.

In the absence of grabirons it was held in an early case that the jury was to consider whether

§ 222. **Contributory negligence does not defeat the action.**—The questions of contributory negligence discussed in the preceding section are not of as much importance as they may seem when the action is brought by an employee injured by a defective coupling or grabiron upon an interstate train or car, or car moving over or used on a railroad used as a highway of interstate commerce as would at first blush seem, in view of the Employers' Liability Act of 1908. It is only an interstate railroad company, or one engaging in interstate traffic, that is required to equip its cars with automatic brakes and couplers and handgrabs or handholds; and consequently all employees engaged on such cars are within the provision of this Act of 1908. In none of the cases cited in the previous section is this question raised or discussed, or even, we believe, alluded to. By the Act of 1908 in all actions brought against a common carrier by railroad for injuries to an employee occasioned while engaged in commerce between any of the several states or territories; or between the District of Columbia, or any of the states or territories and any foreign nation or nations, the fact that he may have been guilty of contributory negligence will not bar a recovery, but his damages will be diminished by the jury in proportion to the amount of negligence attributable to him. If the violation by the common carrier of any statute enacted for the safety of employees contributed to an employee's injury or death, then he cannot be deemed guilty of contributory negligence.<sup>20k</sup> As we have said, this statute is applicable to an employee injured by a defective coupler on an interstate car or a car used on a highway of interstate commerce; and

or not the plaintiff was guilty of contributory negligence in attempting to couple cars. *Cleveland, C. C. & St. L. Ry. Co. v. Baker*, 91 Fed. 224.

<sup>20k</sup>This statute is discussed at length in the first part of this work.

even though he has been guilty of contributory negligence, that will not defeat his cause of action. This question has been decided in the affirmative. In that case the coupler on a car being used in interstate commerce was so defective that it would not couple automatically by impact, and an employee in the performance of his duty, was caught between the cars and injured, the violation of the statute by the company being a contributory cause of the injury, which rendered it liable therefor. It was held that the question of assumption of risk and contributory negligence was immaterial. This employee was charged with the duty to see that the coupling of the cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company. Some of these cars were being used in interstate commerce. It was held that he was employed in interstate commerce, and was within the provision of the Act of 1908.<sup>201</sup> Inasmuch as negligence on the part of the plaintiff reduces the amount of damages he would otherwise recover, a discussion of those cases in which contributory negligence has been involved in safety appliance injuries becomes important in order to measure the amount of recovery.<sup>20m</sup>

**§ 223. Two acts of negligence combining to produce injury.**—Two acts of negligence may so combine as to produce an injury, one of which is a violation of the Safety Appliance Act with reference to automatic couplers. In such an instance the company will be liable, although but for the combination the injury would not have been inflicted.<sup>21</sup> And a violation of the Safety Appliance Act may always be considered by the jury in determining whether or not the defendant company was negligent, so far as its duty was con-

<sup>201</sup> Johnson v. Great Northern Ry. Co. 178 Fed. 643.

<sup>20m</sup> There is the merest intimation in Schlemmer v. Buffalo, etc., Ry. Co. 220 U. S. 590; 31 Sup. Ct. 561; 55 L. Ed. 596, that the stat-

ute of 1908 applies to an injury occasioned by a defective coupler on an interstate railroad.

<sup>21</sup> Voelker v. Chicago, etc., Ry Co. 116 Fed. Rep. 867.

erned towards the employe who was injured while coupling cars not equipped with automatic brakes as the statute required.<sup>22</sup>

§ 224. **State courts may enforce liability for negligence incurred under statute.**—The state courts have the power to entertain suits to recover damages received by reason of a violation of the Safety Appliance Statute.<sup>23</sup> A number of cases have reached the highest courts of several states which had been brought upon the federal statute.<sup>24</sup> And at least two of these have been carried to the Supreme Court of the United States, and either reversed or affirmed; and the question of the state court's jurisdiction never raised. And it has been expressly decided that this federal statute is binding upon a state court and must be applied when the pleadings and facts proven show the case falls within its provisions.<sup>25</sup>

<sup>22</sup> Crawford v. New York, etc., R. Co. 10 Am. & Eng. Neg. Cas. 166; see Chicago, etc., R. Co. v. King, 169 Fed. Rep. 372 (decided February 3, 1909).

<sup>23</sup> St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281; 28 Sup. Ct. Rep. 616; Schlemmer v. Buffalo, etc., Ry. Co. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417; Southern Pac. R. Co. v. Allen, 48 Tex. Civ. App. 66; 106 S. W. Rep. 441; Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; 37 So. Rep. 395; Crawford v. New York, etc., R. Co. 10 Am. & Eng. Neg. Cas. 166.

<sup>24</sup> Missouri Pac. Ry. Co. v. Brinkmeier, 77 Kan. 14; 93 Pac. Rep. 621; Southern Pac. R. Co. v. Allen, 48 Tex. Civ. App. 66; 106 S. W. Rep. 441; Chicago, etc., Ry. Co. v. State, 86 Ark. 412; 111 S. W. Rep. 456; Cleveland, etc., Ry. Co. v. Curtis, 131 Ill. App. 565;

Nicholas v. Chesapeake, etc., Ry. Co. 127 Ky. 310; 105 S. W. Rep. 481; 32 Ky. L. Rep. 270. See Harden v. North Carolina R. Co. 129 N. C. 354; 40 S. E. Rep. 184; 55 L. R. A. 784.

<sup>25</sup> Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258; 37 So. Rep. 395; Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487; 35 So. Rep. 457; York v. St. Louis, I. M. & S. Ry. Co. 86 Ark. 244; 110 S. W. 803; Sprague v. Wisconsin Central R. Co. 104 Minn. 58; 116 N. W. 104; Turretin v. Chicago, St. P., M. & O. R. Co. 95 Minn. 408; 104 N. W. 225; St. Louis, I. M. & S. Ry. Co. v. York, 92 Ark. 554; 123 S. W. 376; Elmore v. Seaboard Air Line Ry. Co. 130 N. C. 205; 41 S. E. 786; Schlemmer v. Buffalo, etc., Ry. Co. 207 Pa. 198; 56 Atl. 417; reversed 205 U. S. 1; 27 Sup. Ct. 407; 51 L. Ed. 681; Schlemmer v. Buffalo, etc., Ry. Co. 222 Pa. 470; 71 Atl. 1053; af-



§ 225. **Removal of case to federal court.**—As the injured employe, when he bases his cause of action upon the terms of the federal statute, can bring his suit in the federal court, the defendant can insist, when the suit is brought on the statute in a state court, if the amount demanded is two thousand dollars or more, that it be removed into the proper federal court. One case on this question was determined in one of the circuit courts. The court assumed the statute was valid, and then proceeded to discuss its removability into the federal court: “Does it follow that the case is a removable one? It is the contention of the plaintiff that the cause of action does not arise under this act of Congress, or at least that it does not so appear from the allegations of this petition. It is undoubtedly true that under the Act March 3, 1887, c. 373,<sup>26</sup> and Act August 13, 1888, c. 866,<sup>27</sup> a case not depending on diversity of citizenship cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution or law of the United States, unless that fact appears by the plaintiff’s own statement of his cause of action; and if it does not, the fact cannot be supplied by the petition for removal.<sup>28</sup> But the court takes notice of the laws of Congress, and, if the facts stated by the plaintiff as the basis of his right of recovery show a right of action given or created by such law, then it may fairly be said that it appears from his own statement of his claim that the action is one arising under a law of the United States. If the same facts show, also, a right of action created or given by a state law, still it would be for the court to determine under which statute the action was maintainable, if at all;

firm ed 220 U. S. 590; 31 Sup. Ct. 561; 55 L. Ed. —; *Neal v. St. Louis, I. M. & S. R. Co.* 71 Ark. 445; 78 S. W. 220; *St. Louis, I. M. & S. R. Co. v. Neal*, 83 Ark. 591; 98 S. W. 958; affirmed 210 U. S. 231; 28 Sup. Ct. 616; 52 L. Ed. 1061. See *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307; 9 So. Rep. 253; 25 Am. St. Rep. 47.

<sup>26</sup> 24 Stat. at L. 552.

<sup>27</sup> 25 Stat. at L. 433 (U. S. Comp. St. 1901, p. 509).

<sup>28</sup> Citing *Chappel v. Waterworth*, 155 U. S. 102; 15 Sup. Ct. Rep. 34; 39 L. Ed. 85; reversing 39 United States v. Atlantic Coast Fed. Rep. 77; *Third St. R. Co. v. Lewis*, 173 U. S. 457; 19 Sup. Ct. Rep. 451; 43 L. Ed. 766.



and if one construction of the federal statute would sustain, and another construction would defeat, a recovery under that statute, the action would be one arising under a law of the United States, and therefore of federal cognizance.<sup>29</sup> It sufficiently appears, therefore, from plaintiff's petition that the cause of action as alleged therein is one arising under a law of the United States," the Act of June 11, 1906.<sup>30</sup> The right to remove a case, brought to recover damages, because of a failure to equip a car is now purely academic; for the amendment to the Act of Employers' Liability Act of 1908 provides that no case arising under "and brought in any state court or competent jurisdiction shall be removed to any court of the United States."<sup>30a</sup>

§ 226. Judicial notice.—A state court will take, and is bound to, notice of the Safety Appliance Act.<sup>31</sup>

§ 227. Pleading.—It is not necessary in bringing an action under the federal statute to specifically refer to it;

<sup>29</sup> Citing *Starin v. New York*, 115 U. S. 248; 6 Sup. Ct. Rep. 28; 29 L. Ed. 388; affirming 21 Fed. Rep. 593; *Carson v. Dunham*, 121 U. S. 421; 7 Sup. Ct. Rep. 1030; 30 L. Ed. 992.

<sup>30</sup> *Hall v. Chicago, etc., R. Co.* 149 Fed. Rep. 564.

If the construction of the Safety Appliance Acts be not drawn into question the case cannot be removed to the Federal Court, even though it be alleged in the complaint or declaration that the train was an interstate one, and not properly equipped with automatic couplers. *Myrtle v. Nevada County & D. Ry. Co.* 137 Fed. Rep. 193; *St. Louis, I. M. & S. R. Co. v. Neal*, 83 Ark. 591; 98 S. W. 958; *International & G. N. Ry. Co. v. Elder*, 44 Tex. Civ. App. 605; 99 S. W. 856.

Where an action was brought, based upon the Federal statutes, and then removed into the Federal Court, and then dismissed by the plaintiff, and the plaintiff then brought a common-law action for this same injury, it was held that the latter case could not be removed into the Federal Court. *Shohoney v. Quincy, O. & K. R. Co.* 223 Mo. 649; 122 S. W. 1025.

<sup>30\*</sup> See Appendix A.

<sup>31</sup> *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395; *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457.

That courts will examine public documents in construing a statute, see *Johnson v. Southern Pacific Co.* 196 U. S. 1; 25 Sup. Ct. 158; 49 L. Ed. 363; *Chicago, M. & St. P. Ry. Co.* 129 Fed. 522.

in fact, it is not good pleading to do so. "As a matter of pleading, it certainly cannot be said that, in order to base a right of recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition. The petition in set words charged the defendant with negligence in having and operating a car upon which was a defective, worn out and inoperative coupler which would not couple by impact. Charging the defendant with negligence was charging that the company had not met or fulfilled the duty imposed upon it by law with respect to having and keeping the coupler upon the car in proper condition for use. It was not necessary, nor, indeed, permissible, under the rules of pleading, that the petition should set forth the law which had been violated.<sup>32</sup> \* \* \* Therefore, when the petition charged the defendant with negligence with respect to the coupler upon the car the defendant must have known, as the car was used in interstate traffic, the act of Congress would necessarily come into consideration in defining the obligations resting upon the defendant company."<sup>33</sup>

<sup>32</sup> "It is not for one moment supposable that the officers of the defendant company or the learned counsel representing it in this case are not, and were not, when this action was commenced, fully aware of the provisions of the act of Congress of March 2, 1893, and the acts of the General Assembly of the State of Iowa, which now form Sections 2079 and 2083, both inclusive, of the code of the state, and therefore knew that as cars used in interstate traffic the obligations of the act of Congress were in force, and as to cars used within the State of Iowa the named sections of the code were applicable." From the opinion above quoted from.

<sup>33</sup> Voelker v. Chicago, etc., Ry Co. 116 Fed. Rep. 867. Approved, Missouri Pac. Ry. Co. v. Brink-

meier, 77 Kan. 14; 93 Pac. Rep. 621; 50 Am. & Eng. R. Cas. (N.S.) 441; Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487; 35 So. Rep. 457. See Lewis v. Pennsylvania R. Co. 220 Pa. 317; 69 Atl. 821.

It has been held that it need not be alleged or proved that the defective car was loaded with interstate traffic. Felt v. Denver & R. G. R. Co. 48 Colo. 249; 110 Pac. 1136.

If the complaint charge that the railroad runs through several states, evidence to show that it was engaged in interstate commerce is admissible. Missouri Pacific Ry. Co. v. Brinkmeier, 77 Kan. 14; 93 Pac. 621.

If the answer does not deny that the car was used in interstate commerce, the allegation that it

§ 228. **Validity of section concerning releases from liability.**—Statutes similar to section five concerning a servant agreeing to exempt his master from liability for his injuries have been held valid in a number of states. A statute prohibiting such a contract is constitutional and within the power of a legislature to adopt on the ground of public policy.<sup>34</sup>

was so used need not be proved. *Norfolk & W. Ry. Co. v. Hazelrigg*, 170 Fed. 551.

Where the action is a common-law one, evidence that all roads were discarding the "Leeds" couplers and using automatic couplers was held not admissible. *Shohoney v. Quincy & O. K. R. Co.* 223 Mo. 649; 122 S. W. 1025.

In a case in the United States Court for the District of North Carolina, the court held an action to recover a penalty a civil action, and that it was not necessary to allege the specific date of the violation of the statute. *United States v. Atlantic, etc., Ry. Co.* 153 Fed. Rep. 918.

In Alabama, very general terms, little short of conclusions, may be used in pleading. *Kansas City, etc., R. Co. v. Flippo*, 138 Ala. 487; 35 So. Rep. 457; adopting *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307; 9 So. Rep. 253; 25 Am. St. Rep. 47. In this state the complaint need not contain an allegation stating in what manner the failure to comply with the statute caused the injury. *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; 37 So. Rep. 395.

<sup>34</sup> *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1; 45 N. E. Rep. 582; *Pittsburg, etc., R. Co. v. Hosea*, 152 Ind. 412; 53 N. E. Rep. 419; *Kilpatrick v. Railroad Co.* 74 Vt. 238; 52 Atl. Rep. 531; 93 Am. St. Rep. 887; *Goldenstein v. Baltimore & O. Ry. Co.* 37 Wash. L. Rep. 2; *Weir v. Rountree*, 173 Fed. 776; *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186; 31 S. C. 164; 55 L. Ed. 167; affirming 168 Fed. 990; *McNamara v. Washington Terminal*, 35 App. D. C. 230; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209; 31 Sup. Ct. 171; 55 L. Ed. —; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549; 31 Sup. Ct. 259; 55 L. Ed. —; affirming 138 Iowa, 664; 116 N. W. 801; *Norfolk & W. Ry. Co. v. Dixie*, 111 Va. 813; 69 S. E. 1106.

A statute forbidding a contract that the employee shall not recover damages if he accepts relief from a relief association has been sustained. *McGuire v. Chicago, etc., R. Co.* 131 Iowa, 340; 108 N. W. Rep. 902, *contra*, *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 331.

## CHAPTER XIV.

### ACTION TO RECOVER PENALTY.

#### SECTION.

229. "Suits" — Criminal offense — Presumption of innocence — Burden—Reasonable doubt.

230. Action to recover a penalty not a criminal action.

231. Joint action.

232. Government's petition.

#### SECTION.

233. Sufficiency of proof—Burden.

234. Jury trial.

235. Directing the verdict.

236. Amount of penalty.

237. Penalty for failure to equip with grabirons.

238. Writ of error.

239. Twice in jeopardy.

§ 229. "Suits"—Criminal offense—Presumption of innocence—Burden—Reasonable doubt.—An action or suit brought by the government to recover a penalty because of non-compliance with the statute in providing cars with automatic couplers has been held to be a criminal action and not a civil action, and must be tried as a criminal case, violations of the statute being construed as criminal offenses—crimes and misdemeanors in the broad sense of the words. The presumption, it was held, therefore, that the defendant is innocent, and that it cannot be found guilty until the evidence removes all reasonable doubt of its guilt, the burden resting upon the government to show beyond a reasonable doubt the existence of every element necessary to constitute the offense; and this burden continues throughout the case and never shifts to the defendant.<sup>1</sup>

§ 230. Action to recover penalty not a criminal action.—In the United States Court for the District of North Carolina, Judge Purnell held, in 1907, that in an action by the government to recover a penalty for a violation of the Safety Appliance Act, the action was governed by the state statute and was a civil suit, and that it was not necessary to allege the specific date on which the statute had been violated by

<sup>1</sup>United States v. Illinois Cent. R. Co. 156 Fed. Rep. 180.

the defendant. "This is an action in debt,"<sup>2</sup> said the court, and he follows the State Supreme Court's construction of such a suit.<sup>3</sup> "The number of the car and nature of the traffic and the date given in each count sufficiently advise the defendant of the times of the violation," said the court, so that it can intelligently prepare its defense. This is sufficient."<sup>4</sup> In another court it was held that it was only incumbent upon the government to prove its case by a preponderance of the evidence, and it need not show the facts constituting the violation beyond a reasonable doubt;<sup>5</sup> and this is now the accepted rule, the case being considered merely a civil action to recover a penalty.<sup>5\*</sup>

<sup>2</sup> Citing *United States v. Southern Ry. Co.* 135 Fed. Rep. 122.

<sup>3</sup> Citing *Hilton Lumber Co. v. Atlantic Coast Line Railroad*, 141 N. C. 171; 53 N. E. Rep. 823; 6 L. R. A. (N. S.) 225.

<sup>4</sup> *United States v. Atlantic, etc., R. Co.* 153 Fed. Rep. 918.

<sup>5</sup> *United States v. Central of Ga. Ry. Co.* 157 Fed. Rep. 893.

<sup>5\*</sup> *Atlantic Coast Line R. Co. v. United States*, 168 Fed. Rep. 175 (decided March 1, 1909); *United States v. Atlantic Coast Line R. Co.* Appendix G; *United States v. P. & Ry. Co.* 162 Fed. Rep. 403; *United States v. Chicago, etc., R. Co.* 162 Fed. Rep. 775; *United States v. Baltimore, etc., R. Co.* 159 Fed. Rep. 33; *Wabash R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909); *United States v. Southern Ry. Co.* Appendix G, 167 Fed. 699; *United States v. Illinois Central R. Co.* (Appendix G, 170 Fed. 542); 166 Fed. 997; *United States v. Philadelphia & R. Ry. Co.* 160 Fed. 696; *United States v. Louisville & N. R. Co.* 162 Fed. 185; *United States v. Illinois Central R. Co.* 170 Fed. 542; *United States*

*v. Balt. & O. S. W. R.* 159 Fed. 33, 38; 86 C. C. A. 223; *United States v. Louisville & N. R. Co.* 167 Fed. 306; *Chicago, B. & Q. Ry. Co. v. United States*, 170 Fed. 556; *Atlantic Coast Line R. Co. v. United States*, 168 Fed. 175, affirming 153 Fed. 918; *United States v. Chicago, R. I. & P. Ry. Co.* 173 Fed. 684; *St. Louis S. W. Ry. Co. v. United States*, 183 Fed. 770; *Atchison, T. & S. F. Ry. Co. v. United States*, 172 Fed. 194; *United States v. Nevada County Narrow Gauge R. Co.* 167 Fed. 695; *Louisville & N. R. Co. v. United States*, 174 Fed. 1021; 93 C. C. A. 664.

This question has been put at rest by the Supreme Court. *Chicago B. & Q. R. Co. v. United States*, 220 U. S. 559; 31 Sup. Ct. 612; 55 L. Ed. 582.

An action to recover a penalty can be brought in the Circuit Court of the District of Columbia if service of process can there be made on the defendant railway company. *United States v. Baltimore & O. R. Co.* 26 App. D. C. 587.



§ 231. **Joint action.**—A joint action may be maintained against two or more companies hauling the same car in a continuous passage over their several roads.<sup>6</sup>

§ 232. **Government's petition.**—In a complaint to recover a penalty under this statute, it is not defective for a failure to negative the exception in the proviso to Section 7 of the act,<sup>7</sup> nor is it defective because it shows that only one of the couplers was out of repair and defective, being so because the uncoupling chain was "kinked"; or because it fails to negative the exercise of reasonable care on the part of the defendant in maintaining the coupler in an operative condition; nor, although showing an actual and substantial hauling of the car in interstate traffic, because it fails to specify how far the hauling was continued, or is even silent as to the actual use of the defective coupler.<sup>8</sup> The practice in the state courts of the district in civil cases control and must be followed.<sup>8\*</sup> It need not be alleged that the defendant acted wilfully in not making the repairs.<sup>8a</sup> Nor need it be averred that the defendant had acted knowingly and negligently; it being sufficient to set forth the cause of action in the language of the statute, with specifications of the time and place, the car, the particular part of the car where the defect existed, and the nature of the defect.<sup>8b</sup>

<sup>6</sup> *United States v. Chicago, etc.*, R. Co. 143 Fed. Rep. 353; *Chaffee v. United States*, 18 Wall. 518, 538.

<sup>7</sup> *Schlemmer v. Buffalo, etc.*, R. Co. 205 U. S. 1; 27 Sup. Ct. Rep. 407; 51 L. Ed. 681; reversing 207 Pa. St. 198; 56 Atl. Rep. 417.

<sup>8</sup> *United States v. Denver, etc.*, R. Co. 163 Fed. Rep. 519.

<sup>8\*</sup> *Atlantic Coast Line R. Co. v. United States*, 168 Fed. Rep. 175 (decided March 1, 1909); *United States v. Atlantic Coast Line R. Co.* Appendix G; *Chicago, etc., R. Co. v. United States*, 168 Fed. Rep. 236 (decided March 10,

1909); *United States v. Montpelier & W. R. R.* 175 Fed. 874.

In the first case cited it was held that in alleging the time of the violation of the statute the declaration was not bad because it was laid "on or about" a certain day named. So decided also in *United States v. Atlantic Coast Line R. Co.* 153 Fed. 918.

<sup>8a</sup> *United States v. Illinois Central R. Co.* 170 Fed. 547.

<sup>8b</sup> *United States v. Oregon Short Line R. Co.* 180 Fed. 483.

The use of the words "on or about," in stating the time, does not render the complaint or peti-

§ 233. **Sufficiency of proof—Burden.**—It is not necessary that the government prove its case beyond a reasonable doubt; but it has the burden to prove its case by evidence that is clear and satisfactory to the jury, and that burden never shifts. It must make out all the elements which go to constitute the charge in the petition. If it fails to come up to this standard, it fails to make out a case.<sup>9</sup> The government need not show that the defendant had not used due care or ordinary diligence in making an inspection and in repairing the defects an inspection would have shown.<sup>10</sup> The rule that positive testimony is preferred to negative testimony, in the absence of other testimony or corroborative evidence, has been adopted.<sup>11</sup> The government must show that the defendant was, at the time the alleged

tion uncertain. *Atlantic Coast Line R. Co. v. United States*, 168 Fed. 175.

As an example of what is sufficient pleading, see *Louisville & N. R. Co. v. United States*, 186 Fed. 280.

<sup>9</sup> *United States v. Philadelphia*, etc., R. Co. 160 Fed. 696 (Appendix G); *United States v. Pennsylvania R. Co.* (Appendix G); *United States v. Lehigh Valley R. Co.* 160 Fed. 696 (Appendix G); *United States v. Chicago*, etc., R. Co. 162 Fed. Rep. 775; *United States v. Louisville*, etc., R. Fed. Rep. 185; *United States v. Chesapeake & Ohio Ry. Co.* (Appendix G); *United States v. Chicago*, etc., Ry. Co. (Appendix G); *United States v. Chicago*, etc., R. Co. 173 Fed. 684 (Appendix G); *United States v. Nevada*, etc., R. Co. 167 Fed. 965 (Appendix G); *United States v. Boston & Maine R. Co.* 168 Fed. 148 (Appendix G); *United States v. Illinois Central R. Co.* 170 Fed. 542; *United States v. Baltimore & O. S. W. R.* 159 Fed. 33, 38; 86 C. C. A. 223; *United States v. Louisville & N. R. Co.* 167 Fed. 306; *Chicago*, B.

& Q. Ry. Co. *v. United States*, 170 Fed. 556; *Atlantic Coast Line R. Co. v. United States*, 168 Fed. 175, affirming 153 Fed. 918; *United States v. Chicago*, R. I. & P. Ry. Co. 173 Fed. 684; *St. Louis S. W. Ry. Co. v. United States*, 183 Fed. 770; *Louisville & N. R. Co. v. United States*, 174 Fed. 1021; 98 C. C. A. 664.

"Every material fact must be proved by a fair balance of evidence to entitle the plaintiff to recover the penalty prescribed by law." *United States v. Montpelier & W. R. R. R.* 175 Fed. 874 (see this case for an example).

Weight to be given to *United States* inspectors and to the defendant's inspectors, see *Norfolk & W. Ry. Co. v. United States*, 177 Fed. 623. The inspectors are not bound to inform the company of the defect. *Norfolk & W. Ry. Co. v. U. S.* 191 Fed. 302.

<sup>10</sup> *United States v. Atlantic*, etc., R. Co. 153 Fed. Rep. 918; *United States v. Wabash R. Co.* (Appendix G).

<sup>11</sup> *United States v. Atchison*, etc., R. Co. 167 Fed. 696 (Appendix G); *United States v. Baltimore & O. Ry. Co.* 170 Fed. 456.

offense was committed, a common carrier by railroad engaged in interstate commerce; that it either hauled or permitted to be hauled over its line, the locomotives, trains or cars mentioned in its complaint; and that these locomotives, trains or cars were not provided with the equipment required by the statute.<sup>12</sup> When it has made this proof, then the burden is upon the defendant to show an excuse,—to show that it had used all reasonably possible endeavor to perform its duty to discover and correct the defect.<sup>12\*</sup>

§ 234. **Jury trial.**—There is no law that authorizes a trial by the court in an action to recover a penalty; the case must be tried by a jury; and if a court should assume to try a case, its judgment cannot be reviewed at the instance of the government.<sup>12a</sup>

§ 235. **Directing the verdict.**—If the evidence produces evidence clearly sustaining its declaration or petition, and the defendant introduces none, then the government is entitled to have the jury directed to return a verdict in

<sup>12</sup> United States v. Pacific Coast Ry. Co. (Appendix G).

<sup>12\*</sup> United States v. Illinois Central R. Co. 170 Fed. 542 (Appendix G). An expert trainman may be asked at the trial concerning the condition of the car coupler and as to what was necessary in order to operate such coupler. The mode of operating automatic coupling mechanism and the effect of various conditions thereof is the subject of expert testimony. *Wabash R. Co. v. United States*, 168 Fed. Rep. 1 (decided February 3, 1909). See *Chicago, etc., R. Co. v. King*, 169 Fed. Rep. 272 (decided February 3, 1909).

If the answer does not deny that car was being used in interstate commerce when out of repair, it is admitted and need not be proven.

*Norfolk & W. Ry. Co. v. Hazelrigg* 170 Fed. 551.

The prosecution may use the record of cars kept by the defendant to show that the car was used in interstate commerce. *Louisville & N. R. Co. v. United States*, 186 Fed. 280.

Evidence of the condition of the cars when last inspected, thirty-seven miles distant, before they arrived at the station where the defects were discovered and material slips of the workmen who repaired them were held competent evidence upon the issue in an action to recover a penalty. *United States v. Rio Grande W. Ry. Co.* 174 Fed. 399.

<sup>12a</sup> *United States v. Louisville & N. R. Co.* 167 Fed. 306.

its behalf.<sup>12b</sup> "If, in a civil action to recover a penalty, the defendant is entitled, the evidence being undisputed, to have a peremptory instruction in his behalf, it is difficult to perceive why the government is not entitled to a peremptory instruction in its favor, where the undisputed testimony left no facts for the jury to consider, but established, beyond all question and as a matter of law, its right to judgment for the prescribed penalty."<sup>12c</sup> But it has been held in the Seventh Circuit that the court has no power to direct a verdict in favor of the government;<sup>12d</sup> but the reason of the case does not commend itself. No reference is made to the decision of the Supreme Court from which a quotation is made above.

<sup>12b</sup> United States v. Atlantic Coast Line R. Co. 182 Fed. 284.

<sup>12c</sup> *Hegner v. United States*, 213 p. 114; 29 Sup. Ct. p. 499; 53 L. Ed. 720.

"This is a civil case; otherwise, there would have been an indictment. The reasoning of the Supreme Court and its conclusion is controlling on my action. The evidence here is singularly clear, and absolutely uncontradicted on the twenty counts, and on the twenty counts the government has made out its case—that the railroad company did in fact run out cars upon which the safety equipment required by the act of Congress was in such condition that it could not have protected the operatives from the danger of death and mutilation, from which this benevolent law seeks to protect them. It is also in evidence, while the equipment was thus ineffective, that the slightest effort to repair the defects would have remedied them, and danger to life and limb would have been avoided. If the court neglects to enforce the great purpose which moves the framers of our laws to protect the people from

the negligence or indifference of those in control of the powerful and dangerous engines of modern transportation, the benefits of those laws will be lost to the public for the present time, and possibly for the future. But, if the courts and the juries do their duty, the officers of the corporations, when they find there is a penalty which will be enforced, will very soon begin to respect the law, and hundreds of thousands who now labor in peril, or languish as the result of preventable wounds—the mashing and grinding of bones of the well and strong—will live out the normal period of their lives.

"As I understand, there has been a wonderful decrease in such mutilations and in such deaths since this law went into effect. The almost incredible dangers to which we are exposed may be realized when I tell you that it is stated that our country suffers in loss of life and limb every year as much as the Northern and Southern armies lost in killed and wounded on the bloody field of Gettysburg. Now what would be the effect upon the minds of the people through-



§ 236. **Amount of penalty.**—A railroad company hauling cars not equipped as the statute requires is liable to a penalty of \$100 for each car so hauled.<sup>13</sup> But for hauling a train of cars not properly equipped with air brakes there can be recovered a penalty of only \$100 for the entire train regardless of the number of cars not equipped with air brakes.<sup>14</sup> “The penalty recovered is not money coming to the government as something that is its own; nor money, a part of which is the government’s own, as in the violation of revenue statutes; nor money coming to the government in the exercise of its power *patriæ parens*, for the protection of a class, but is the punishment that the government, in its capacity as protector of society, inflicts upon the carrier who has violated the protection measure thus provided—the fine collected going into the treasury of the government simply because it must go somewhere, and, as in

out the land if they knew that in the process of one business, that at one place each year, would meet contending forces that would put to death at once as many people as were killed and wounded at Gettysburg? Why, men the world around would be shocked in every fiber of our natures. Yet such are the facts; those are the results these laws are intended to protect. It is a great law; it is a benign law; it is intended to protect as fearless and as worthy, if sometimes careless, class of our people, careless because they are always in the presence of danger, as any nation can produce. The defendant will not be permitted here to whittle down these laws, or to defeat them by unnecessary technicalities.

“These observations are perhaps not essential to this case. They are merely the views of the court. What is essential, though, is that I direct a verdict for the plaintiff for the full amount sued for.”

United States v. Atlantic Coast Line R. Co. 182 Fed. 284.

This case is mentioned in Galveston, H. & S. A. R. Co. 183 Fed. 579; 105 C. C. A. 422, where a case was affirmed in which a verdict had been directed.

See also Proctor & Lohman v. People, 24 Ill. App. 599; State v. Kansas City, Ft. S. & M. R. Co. 70 Mo. App. 634; Hitchcock v. Munger, 15 N. H. 97; and People v. Briggs, 114 N. Y. 56; 20 N. E. 820.

<sup>12d</sup> Atchison, T. & S. F. Ry. Co. v. United States, 172 Fed. 194; 96 C. C. A. 646.

<sup>13</sup> United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775; United States v. Atlantic Coast Line R. Co. (Appendix G); Atlantic Coast Line R. Co. v. United States, 168 Fed. Rep. 175 (decided March 1, 1909); St. Louis S. W. Ry. Co. v. United States, 183 Fed. 770.

<sup>14</sup> United States v. Chicago, etc., R. Co. 162 Fed. Rep. 775.



other criminal cases, there is no other appropriate place to direct it.”<sup>14a</sup>

§ 237. **Penalty for failure to equip with grabirons.**—The statute of 1893 makes it an offense “to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater safety to men in coupling and uncoupling cars.” A penalty is prescribed for “using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions” of the statute. A railroad was charged by the government to have hauled in a train on a certain day a car not provided with a grabiron or handhold such as the law requires. The question arose whether or not a stoppage of the car in the journey constituted one or two offenses. Upon that point the court charged the jury as follows:

“The government claims here that it has proved to you by a preponderance of the evidence not only one violation of the statute, but two. Now, on that point, gentlemen, you will consider whether or not this car, in the first place, was unprovided with grabirons or handholds, as it should have been, and, in the second place, whether it was moved by this railroad in more than one train. Let us suppose that you have found that that car was on a given day not properly provided with grabirons and handholds as the statute requires. Let us suppose that that car was at the time being moved in a train. Let us suppose that that train stopped for some purpose, no matter what, for a while, and, after having so stopped for a certain time, started up and went on again. Now, in a supposed case like that, my instruction to you would be that there were not two violations of the law, but only one, because the car was all the time being moved in the same train. I should instruct you, gentlemen, that, so long as the car is being all the

<sup>14a</sup> Atchison, T. & S. F. Ry. Co. *United States v. Chicago*, R. I. & v. *United States*, 172 Fed. 194, P. Ry. Co. 173 Fed. 684.

time moved in the same train, it makes no difference that it is being so moved on two different days; that so long as the car continues being moved by the railroad on the same train it makes no difference that September 19th has run out and September 20th has come in; that that does not make two distinct violations of the statute, but the movement of the car being, though on those two different days, all the time in one train, there has been one violation of the statute. You will consider upon the evidence to which you have listened whether this car has been moved in more than one train. If you so find, it will be proper, provided you have been satisfied by a preponderance of the evidence that it was being so moved without the grabirons and handholds which the law requires, to find for the plaintiff both on the first count and on the fifth count. If, on the other hand, you are not satisfied by a preponderance of the evidence that the car was moved in two trains, but was only so moved in one, that both on September 19th and on September 20th the car was continued all the time in one train, you should then find for the plaintiff only on one of those counts, either the first or fifth, but you should not find for the plaintiff on both of them.<sup>14b</sup> In regard to what makes the trains, by 'train' I understand one aggregation of cars drawn by the same engine, and, if the engine is changed, I understand there is a different train."<sup>14c</sup>

§ 238. **Writ of error.**—From an adverse judgment the government may have a writ of error from the District Court to the Circuit Court of Appeals.<sup>15</sup> But if the judge

<sup>14b</sup> These two counts related to the same unequipped car.

<sup>14c</sup> *United States v. Boston & M. R. Co.* 168 Fed. 148.

It has been held that a freight train scheduled to run regularly between points in different states is a single train throughout such run and at all times subject to the act, although some of the cars composing it may have been left

and others taken on at different stations, and although after entering the second state the engine, caboose and train crew were changed. *United States v. Chicago Great Western Ry. Co.* 162 Fed. 775.

<sup>15</sup> *United States v. Illinois Central R. Co.* 170 Fed. 542 (Appendix G); *United States v. Louisville & N. R. Co.* 167 Fed. 306; *Chicago,*

of the District Court tries the case without a jury, his decision cannot be reviewed at the instance of the government; for there is no law that authorizes him to try the case.<sup>16</sup>

§ 239. **Twice in jeopardy.**—The constitutional prohibition that no one shall be twice put in jeopardy has no application when applied to the assessment of a penalty under this statute.<sup>17</sup>

B. & O. R. Co. v. United States, 220 U. S. 559; 31 Sup. Ct. 612; 55 L. Ed. 582; affirming 170 Fed. 556; 95 C. C. A. 556; United States v. Baltimore & O. S. W. Ry. Co. 159 Fed. 33, 38; 86 C. C. A. 233. Of course, the defendant may also have the writ when the judgment is adverse to it. Atlantic

Coast Line R. Co. 168 Fed. Rep. 175 (decided March 1, 1909).

<sup>16</sup> United States v. Louisville & N. R. Co. 167 Fed. 306. See Rogers v. United States, 141 U. S. 548; 12 Sup. Ct. 91; 35 L. Ed. 853.

<sup>17</sup> United States v. Illinois Central R. Co. 170 Fed. 542.

## CHAPTER XV.

### HOURS OF LABOR.

#### SECTION.

- 240. Statutory provisions.
- 241. Constitutionality of statute.
- 242. Validity of state statute covering the subject of the Federal statute.
- 243. Power of Interstate Commerce Commission to require reports—Validity of statute.
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#### SECTION.

- 248. Deducting time lost by failure of locomotive to get up steam—Bad coal.
- 249. Deducting time lost by hot boxes
- 250. Time lost by sidetracking—deducting.
- 252. Time train delayed cannot be deducted from period of time of service.
- 253. Delay in starting caused by another train.
- 254. Injury to employee—Right of action.
- 255. Question for jury.

§ 240. **Statutory provisions.**—It is unlawful for any interstate commerce common carrier, its officers or agents “to require or permit any employee subject to” the statute on hours of labor for railroad men, “to be or remain on duty for a longer period than sixteen consecutive hours,” and it is provided that “whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty.” In a proviso to this section, it is provided that in the case of an “operator, train dispatcher, or other employee, who by the use of the telegraph or telephone dispatches repeats, transmits, receives or de-

givers orders pertaining to or affecting train movements" he cannot be "required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations, operated only during the daytime, except one of emergency." In case of such an emergency the employees just named in the proviso "may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period or not exceeding three days in any week."<sup>1</sup> The penalty cannot exceed five hundred dollars, to be recovered in an action brought by the United States District Attorney of the district within one year from the date of the violation. In all such prosecutions "the common carrier shall be deemed to have had knowledge of all acts of the officers and agents." "In case of any casualty or unavoidable accident as the Act of God or where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen" the statute does not apply. Nor does the statute "apply to the crews of wrecking or relief trains."<sup>2</sup>

§ 241. **Constitutionality of statute.**—This statute has been held to be constitutional.<sup>3</sup> "The fundamental question here," said Justice Hughes, "is whether a restriction upon the hours of labor of employees who are connected with the movements of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the

<sup>1</sup> See Appendix F.

<sup>2</sup> Appendix F.

<sup>3</sup> *United States v. Illinois Central R. Co.* 180 Fed. 630; *Chicago, M. & St. Paul Ry. Co.* 136 Wis.

407; 117 N. W. 686; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; 31 Sup. Ct. 621; 55 L. Ed. —.



human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the clause defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution.<sup>4</sup> If, then, it be assumed, as it must be, that, in the furtherance of its purpose, Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations."<sup>5</sup> Nor is the statute void because of the fact that many of the interstate employees are also employed in intrastate transportation.<sup>6</sup> Nor do the words "except in case of emergency" in the proviso to section two make the application of the act so uncertain as to destroy its validity, even though the proviso in section three, limiting the effect of the entire act, can be said to include everything which may be embraced within the term "emergency." "It is said that the words 'except in case of emergency' make the application of the act so

<sup>4</sup> Citing *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549; 31 Sup. Ct. 259; 55 L. Ed. —.

<sup>5</sup> *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; 31 Sup. Ct. 621, 55 L. Ed. 878; *United States v. Kansas City Southern Ry. Co.* Appendix G.

See also *Black v. Charleston & W. C. Ry. Co.* (S. C.); 69 S. E. 230; *Kansas City Southern Ry. Co. v. Quigley*, 181 Fed. 190.

<sup>6</sup> *Baltimore & J. R. Co. v. Interstate Commerce Commission*, *supra*.

uncertain as to destroy its validity," continues Justice Hughes. "But this argument in substance denies to the legislature the power to use a generic description, and, if pressed to its logical conclusion, would practically nullify the legislative authority by making it essential that legislation should define, without use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged. Nor does the contention gather strength from the broad scope of the proviso in section three, for if the latter, in limiting the effect of the entire act, could be said to include everything that may be embraced within the term of 'emergency,' as used in section two, this would be merely a duplication which would not invalidate the act."<sup>7</sup>

**§ 242. Validity of state statute covering the subject of the Federal statute.**—Because Congress has enacted a law upon the subject limiting the number of hours a train crew may be kept at work, or other employee, it does not follow that a state may not also prescribe rules on the same subject. Thus a statute of New York provided that any corporation operating a line of railroad "in whole or in part" in that state should not "require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed as the 'block system,' " and certain other persons engaged in the management of trains, "to be on duty more than eight hours in a day of twenty-four hours;" and it was "declared that eight hours shall constitute a day of employment for all laborers or employees engaged in that kind of labor" above stated. An exception was made in these "cases of extraordinary emergency caused by accident, fire, flood, or danger

<sup>7</sup> *Baltimore & O. R. Co. v. Interstate Commerce Commission, supra.*

The Pennsylvania statute is valid. *Commonwealth v. Casey*, 43 Pa. Super. Ct. 494.

to life or property." It was limited in its application to those parts of a railroad where more than eight regular passenger trains in twenty-four hours pass each way, but not "where twenty freight trains pass each way generally in twenty-four hours notwithstanding that there may pass a less number of passenger trains than eight passenger trains daily." This statute was attacked upon the ground that the legislature had no power to place such a limitation on the right of a railroad to keep its employees on duty; but the court held that the argument in favor of the attack was untenable. The court said: "The doctrines that the legislature under proper circumstances and within reasonable limits may exercise its police power in the regulation of hours and conditions of labor is now thoroughly and broadly established. One familiar form of this class of legislation is that which has for its object the promotion of the health and welfare of the employee as especially in the case of women and children. Another class seeks to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies but by excessive periods of duty they become fatigued and indifferent and cause accidents leading to injuries and destruction of life. This statute comes within the latter class." A second attack on the validity of the statute was that the employee to whom it applied "being in part engaged in forwarding interstate commerce, Congress had the superior power to regulate his hours of labor, and that it had done this by legislation which barred or superseded the state legislation." The court also held this attack not well taken, saying that "within the authority of those cases,<sup>s</sup> and of what

<sup>s</sup> *Gulf, etc., Ry. Co. v. Hefley*, 158 U. S. 98; 15 Sup. Ct. 802; 39 L. Ed. —; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613; 18 Sup. Ct. 488; 42 L. Ed. 878; affirming 56 Kan. 694; 44 Pac. 632; *Reid v. Colorado*, 187 U. S. 137; 23 Sup. Ct. 92; 47 L. Ed. 108;

*Sinnot v. Davenport*, 22 How. 227; 16 L. Ed. 243; *Smith v. Alabama*, 124 U. S. 465; 8 Sup. Ct. 564; 31 L. Ed. 508; affirming 76 Ala. 69; *Hennington v. Georgia*, 163 U. S. 299; 16 Sup. Ct. 1086; 41 L. Ed. 166; affirming 90 Ga. 396; 17 S. E. 1009; *Gladson v. Minne-*

was said in deciding them, it may be held that where Congress has prescribed a general minimum limit of safety applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not trespass upon forbidden territory and become obnoxious because, in response to special conditions within its limits, it has raised such limit of safety. There is no conflict; the state has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the class of employees named might be employed for nine hours or less, and the state had then fixed the lesser number, which was left open by the Federal statute. The form of the latter fixing the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary. Such is the view which this court has taken on another occasion in the decision of a question quite identical with that here presented.”<sup>9</sup> But there are a number of decisions which hold state legislation on the subject of the number of hours that employees may be kept at work unconstitutional.<sup>10</sup>

**§ 243. Power of Interstate Commerce Commission to require reports—Validity of statute.**—By section four of this Act it is made the duty of the Interstate Commerce Commission to enforce the provisions of this statute, and all powers granted to such Commission are “extended to it in

*note*, 166 U. S. 427; 17 Sup. Ct. 627; 41 L. Ed. 1064; affirming 57 Minn. 385; 59 N. W. 487; 24 L. R. A. 502.

<sup>9</sup> *People v. Erie R. Co.* 198 N. Y. 369; 91 N. E. 849; 29 L. R. A. (N. S.) 240; reversing 135 N. Y. App. Div. 767; 119 N. Y. Supp. 873; *Lloyd v. North Carolina R. Co.* 151 N. C. 536; 66 S. E. 604.

<sup>10</sup> *State v. Chicago, M. & St. P. Ry. Co.* 136 Wis. 407; 117 N. W. 686; 19 L. R. A. (N. S.) 326;

*State v. Missouri Pacific Ry. Co.* 222 Mo. 658; 111 S. W. 500; *State v. Texas & N. O. R. Co.* (Tex. Civ. App.) 124 S. W. 984. See *State v. Northern Pacific Ry. Co.* 36 Mont. 582; 93 Pac. 945; 15 L. R. A. (N. S.) 134; and *State v. Northern Pacific R. Co.* 53 Wash. 673; 102 Pac. 876, as to legislation after the act of Congress was enacted and before it applied to interstate railway companies.



the execution" of the act. Section twenty of the Interstate Commerce Commission Act was amended in 1910,<sup>11</sup> so as to enable it "by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or keep itself informed, or which it is required to enforce."<sup>12</sup> Under these two statutes the Commission can by order require reports to be made concerning the hours employees are required to perform service. "To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employees who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose, and are comprehended within the power of the Commission." \* \* \* Nor is the statute void with \* \* \* respect to those reports on the ground that it is contrary to the Fourth Amendment of the Constitution with reference to unreasonable search and seizure; nor can the railway company plead a privilege against self-implication under the Fifth Amendment.<sup>13</sup> "With respect to the officers," said the court, "it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one, which cannot be asserted on their behalf by the corporation. But the transactions to which the required reports relate are corporate transactions, subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action,

<sup>11</sup> 36 Stat. at L., c. 309, p. 556.

<sup>12</sup> These reports must be under oath "whenever the Commission so requires."

<sup>13</sup> Citing *Hale v. Henkel*, 201 U. S. pp. 74, 75, 665, 666; 26 Sup. Ct. 370; 50 L. Ed. 652; affirming 139

Fed. 496; *Hammond Packing Co. v. Arkansas*, 212 U. S. pp. 348, 349; 29 Sup. Ct. 370; 53 L. Ed. 543, 544; *Wilson v. United States*, 220 U. S. 614; 31 Sup. Ct. 538; 55 L. Ed. 610.



where these are ordered by the Commission, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation, and cannot claim a personal privilege to the requirement.”<sup>14</sup>

§ 244. **Statute liberally construed.**—This statute is liberally construed. “The act being remedial, for the purpose of preventing accidents to trains and consequent injuries to passengers and employees, it is the duty of the court to construe it liberally in order to accomplish the purpose of its enactment.<sup>15</sup> Experience has shown that many serious accidents to trains, causing great loss of life or permanent disabilities to passengers, as well as employees, are often due solely to the fact that members of the train crew had become exhausted by reason of being required or permitted to remain on duty for too long a period, and therefore unable to give the care and attention necessary for the safety of the train. To prevent accidents from such causes, the Congress in its wisdom enacted this statute prohibiting railroads not only from requiring any employee subject to the act to remain on duty for a longer period than sixteen consecutive hours, but also ‘permitting’ it.”<sup>16</sup>

§ 245. **Casualty or unavoidable accident—Act of God.**—The proviso of the third section of this statute provides that the provisions of the statute “shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or to officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.” The provisions of the act do “not apply to the crews of wrecking or relief trains.”

<sup>14</sup> *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; 31 Sup. Ct. 621; 55 L. Ed. 878.

*Pacific Co.* 196 U. S. 1; 25 Sup. Ct. 158; 49 L. Ed. 363.

<sup>16</sup> *United States v. Kansas City Southern Ry. Co.* Appendix G.

<sup>17</sup> *Cling Johnson v. Southern*

If it desires to avail itself of the provisions of this proviso, a defendant railway company must bring itself strictly within the latter as well as its reason of such provisions in order to escape the penalty provided in the act. An act of God is something which occurs exclusively by the violence of nature, at least an act of nature which implies an entire exclusion of all human agencies. Such would be a landslide blocking a railway track, extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths, and illnesses; but not a rain not of unusual violence and its probable results in softening the superficial earth. It is an act in which no man has an agency whatever. It must be such as a person of reasonable prudence and foresight could not have guarded against. A casualty is an act which proceeds from an unknown cause or is an unusual effect of a known cause. Some of the authorities hold that an "unavoidable accident" is synonymous with "act of God," but the better definition is that it must be an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions and without any fault attributable to the party sought to be held responsible. It is one that occurs without any apparent cause and without any fault attributable to anyone. If it is attributable to the negligence of any person, it is not an unavoidable accident. It must be an accident which cannot be anticipated or avoided by the exercise of due diligence and foresight.<sup>17</sup>

<sup>17</sup> *United States v. Kansas City Southern Ry. Co.* Appendix G; citing *Gleason v. V. M. R. Co.* 140 U. S. 435; 1 Sup. Ct. 859; 35 L. Ed. 458; *The Majestic*, 166 U. S. 375; 17 Sup. Ct. 597; 41 L. Ed. 1039; *Harrison v. Hughes* 125 Fed. 860; 60 C. C. A. 442; *Bullock v. White Star Steamship Co.* 30 Wash. 448; 70 Pac. 1106; *Chicago, etc., R. Co. v. Pullman South-*

*ern Car Co.* 139 U. S. 79; 11 Sup. Ct. 490; 35 L. Ed. 97; *Clyde v. R. & D. R. Co.* 59 Fed. 394; *Fish v. Clapman*, 2 Ga. 349; *Dickson v. United States*, 1 Brock —; *Newport News & N. V. Co. v. United States*, 61 Fed. 488; 9 C. C. A. 579; *United States v. Southern Pacific Co.* 157 Fed. 459; *United States v. Atchison, T. & S. F. Ry. Co.* 166 Fed. 160; *United*

§ 246. **Period of consecutive hours.**—The number of hours in twenty-four hours during which an employee may be required to work need not be consecutive hours; but may be divided into two or more periods, so long as their totality does not exceed a prohibitive number in any twenty-four hours. Thus where a telegraph operator dispatching, reporting, transmitting, receiving and delivering orders pertaining to or affecting train movements in interstate commerce was required to be on duty in an office, continuously operated day and night from 6:30 o'clock a. m. until 12:00 o'clock noon, and then from 3:00 o'clock p. m. until 6:30 p. m., making in all nine hours actual service, but twelve hours from the beginning until the end thereof, it was held that the railway company had not violated the statute. In passing on the case the court said: "The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into 'two periods,' separated by the intermission (for which the statute makes no provision), or is to be considered as 'one period,' including the intermission, which would make it a period of twelve hours. But manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employee's service; for the statute

*States v. Union Pacific R. Co.* 160 Fed. 65; 95 C. C. A. 433; *United States v. Atlantic Coast Line R. Co.* 173 Fed. 764; 98 C. C. A. 110; *The Olympia*, 61 Fed. 120; 9 C. C. A. 393; *Welles v. Castles*, 69 Mass. 325; *Dreyer v. People*, 188 Ill. 40; 58 N. E. 620; *Smith v. Southern Ry. Co.* 129 N. C. 374; 40 S. E. 86; *Tays v. Echer*, 6 Tex. Civ. App. 188; 24 S. W. 954; *Crystal Springs Dist. Co. v. Cox*, 49 Fed. 556; 1 C. C. A. 365.

It is error to charge the jury under the Ohio statute that, if the train was delayed by an accident, the statute has no application unless the railroad company knowing that the crew had been on duty more than fifteen consecutive hours could have reasonably provided in the proper operation of the train other servants competent to relieve the crew. *Baltimore & O. Ry. Co. v. Collins*, 30 Ohio Civ. Ct. App. 110.

was enacted in view of the customs of the land, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word 'period,'—that 'period' is 'a term,' 'a cycle,' something 'continuous' between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission. We cannot concur in this view. The statute was passed with custom as a background. According to custom, nine hours' work unquestionably means nine hours' actual employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new western states, the actual service of employees is divided, necessarily divided, throughout the day, to correspond with the arrival and departure of trains. Certainly, Congress did not intend to override these existing customs; making it necessary either that the railroad company should not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a different telegraph operator for every train that came and went (trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word 'period,' all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and in the light of ordinary custom, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short periods at short intervals, say every alternate hour, or an hour in every two



hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure. A further answer is that dispatchers, being 'employees,' come under the protection of the main part of the section which gives to all employees 'at least eight consecutive hours off duty' in each day, counting from some point in the next day."<sup>18</sup>

**§ 247. Hours of employment—Inspection of engine by engineer.**—In addition to the hours of service the statute permits, the railroad company cannot require a locomotive engineer to report before his time begins to run and to spend a certain time—thirty minutes—in the inspection of his locomotive. "In my opinion," said the court, "this man was on duty, within the meaning of the act, from the time he went there and commenced to supervise, or overlook, that engine in preparation for the trip. It does not make any difference whether he was paid for this time or not. That was the time his work and the strain on him began. The work of an engineer, or employee of the railroad, begins when under the rule of the company he is there and is at work in connection with the preparation of the engine for the moving of the train. He must look over the engine. He must see that it is oiled up. He must see that the air brakes are all right. He must move the engine down over the tracks and across the switches to connect it with the train. And in my opinion he is on duty, within the meaning of the act, during the time he is doing these things. If

<sup>18</sup> Atchison, T. & S. F. Ry. Co. v. United States, 177 Fed. 114. The nightmen worked from 6:30 P. M. until 6:30 the next morning.

with three hours off duty from 12 o'clock midnight until 3 o'clock A. M. Affirmed, 220 U. S. 37; 30 Sup. Ct. 362; 55 L. Ed. 361.



he goes there half an hour before the time to start to do these things, during the time he is there doing them he is on duty.”<sup>19</sup>

§ 248. **Deducting time lost by failure of locomotive to get up steam—Bad coal.**—“The time lost by reason of the locomotive getting out of steam or cleaning flues could, by the exercise of reasonable diligence, certainly have been anticipated and prevented. The coal, although testified to that it was as good as that sold to other railroads, evidently was not a good steam coal, or else the engine must not have been in proper condition. In fact the evidence of the engineers of defendant shows that the engines used on these trains were old and the coal, owing to a good deal of slack, would cake and not burn as freely as lump coal. If fire will give out frequently as the evidence in this case shows, there must certainly be a remedy for it. What would become of defendant’s through passenger trains if this condition existed on their locomotives? All the delays shown by the evidence to have occurred could have been prevented by the exercise of reasonable diligence, or at least anticipated, and the court is unable to find, after a careful reading of all the testimony, that any delays were caused by casualty, unavoidable accident, or act of God, or by any cause which could not have been foreseen.”<sup>20</sup>

§ 249. **Deducting time lost by hot boxes.** Hot boxes are not unavoidable or unforeseen accidents; and a careful examination of them before starting a train and a close investigation at stopping points will reduce accidents of that nature to a minimum. “The officials of defendant could reasonably anticipate that hot boxes are likely to occur on every train, more especially on freight trains such as these were, and it was their duty to take that fact, as well as the frequency with which other trains would be met, into con-

<sup>19</sup> United States v. Illinois Central R. Co. 180 Fed. 630.

<sup>20</sup> United States v. Kansas City Southern Ry. Co. Appendix G.

sideration in establishing the division or terminal yards and determining the distance for them. If they failed to do so and by reason of such failure the crews on its trains are required to remain on duty for a longer period than sixteen consecutive hours it is guilty of a violation of this Act.<sup>21</sup>

**§ 250. Time lost by side-tracking—Deducting.**—Time lost by reason of side-tracking to give passenger or superior freight trains the right of way cannot be deducted from the time a crew may be kept out so as to bring such time within a period not exceeding sixteen hours; for it is no excuse if the meeting of such trains could have been anticipated at the time the train was dispatched from the starting point.<sup>22</sup>

**§ 252. Time train delayed cannot be deducted from period of time of service.**—The time during which the train is delayed cannot be included within the time the crew is on duty. There is nothing in the statute to justify a construction that will allow such a deduction. "The employee goes on duty when required by the rules of the employer to report for duty, and if for any reason he is delayed, unless it is for some cause excepted by the proviso of this Act [in section 3], the time he is on duty runs."<sup>23</sup> Any other construction could, to a great extent, defeat the object of the statute to prevent employees of railroads from working for so many hours as to unfit them to discharge their duties intelligently and with safety to the train. It may and does often happen frequently that trains are delayed five or six hours or even eight hours. If the employees composing the crew on that train are required to remain on duty during that time and then remain on duty for sixteen hours while

<sup>21</sup> United States v. Kansas City Southern Ry. Co. Appendix G.

<sup>22</sup> United States v. Kansas City Southern Ry. Co. Appendix G; cit-

ing United States v. Southern Pacific Co. 157 Fed. 459.

<sup>23</sup> Citing United States v. Illinois Central R. Co. 180 Fed. 630.

the train is being operated, would they be in physical condition to manage that train with safety?"<sup>24</sup>

§ 253. **Delay in starting caused by another train.**—Delay in starting caused by reason of the fact that another train is late is no excuse within the meaning of the proviso to section three. It is not an unavoidable delay by which the keeping of trainmen on duty longer than the statute allows which will excuse a railway company. "That was a matter," it was said in one case, "which was known to the carrier or its officers in charge of the employees at the time they left the terminal and they knew that it would cause delay in the employees getting off duty. There is nothing unforeseen in this."<sup>25</sup>

§ 254. **Injury to employee—Right of action.** Anyone who is injured by reason of the fact that an employee is kept at work in violation of the hours-of-labor statute can recover damages, and the employee thus kept at labor who is injured by reason of that fact may also recover damages, "if by reason of his dazed mental condition, caused by his protracted employment beyond the limits of the time fixed by the statute, he was unable to apprehend clearly his duties," and a condition was brought about by him—as a collision—whereby he was injured. "The bare fact of the performance of the work prohibited, with the injury resulting, is proof of negligence."<sup>26</sup> On the contrary, it has been held that such employee is in *pari delicto* with the railway company, and cannot recover damages for his injury.<sup>27</sup> The

<sup>24</sup> United States v. Kansas City Southern Ry. Co. Appendix G.

<sup>25</sup> United States v. Kansas City Southern Ry. Co. Appendix G.

<sup>26</sup> Pelin v. New York Central R. Co. 92 App. Div. 71; 92 N. Y. Supp. 468; affirmed, without opinion, 188 N. Y. 565; 91 N. E. 1171. The court cites on the point in the quotation Marino v. Lehmaier, 173

N. Y. 530; 66 N. E. 572; 61 L. R. A. 811. Approved in People v. Erie R. Co. 198 N. Y. 369; 91 N. E. 849, reversing 135 N. Y. App. Div. 767; 119 N. Y. Supp. 873; Baltimore & O. Ry. Co. v. Collins, 30 Ohio Cir. Ct. Rep. 110.

<sup>27</sup> Lloyd v. North Carolina R. Co. 151 N. C. 536; 66 S. E. 604.

decision of the New York courts may be regarded as sounder than that of North Carolina; and far more likely to protect those employed on railroads, who, if they refused to work in excess of the hours permitted by the statute would, in the greatest likelihood, find themselves without employment and without means to earn a livelihood.

§ 255. **Question for jury.**—Whether or not there was just cause for keeping a train crew at work more than sixteen consecutive hours within the provisions of the proviso of section three, is a question for the jury under the instruction of the courts.<sup>28</sup>

<sup>28</sup> United States v. Kansas City Southern Ry. Co. Appendix G.

## APPENDICES.





## APPENDIX A.

### EMPLOYERS' LIABILITY ACTS.

[Act of 1906.]

AN ACT relating to liability of common carriers in the District of Columbia and Territories, and common carriers engaged in commerce between the States and between the States and foreign nations to their employes.

[Act of 1906.]

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,* That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employes, or in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its

[Act of 1908.]

AN ACT relating to the liability of common carriers by railroad to their employes in certain cases.

[Act of 1908.]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents, and if none, then to the next of kin dependent upon such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negli-

negligence in its cars, engines, appliances, machinery, track, road-bed, ways or works.

gence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employe, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment.

SEC. 2. That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: *Provided, however,* That no such employe who may be injured or killed shall be held to have been guilty of contributory negli-

gence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employe, or the person entitled thereto, on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which defendant shall

be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (As amended April 5, 1910.)

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads, or impair the rights of their employes under the Safety Appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

Approved June 11, 1906; 34 Stat. at Large, 232 c. 3073.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employes under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress, entitled, "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employes," approved June 11, 1906.

Approved April 22, 1908.

SEC. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (As amended April 5, 1910.)



## POOR PERSON.

[PUBLIC—No. 317.]

[S. 5836.]

AN ACT to amend section one, chapter two hundred and nine, of the United States Statutes at Large, volume twenty-seven, entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," and to provide for the prosecution of writs of error and appeals in *forma pauperis*, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section one of an Act entitled "An Act providing when plaintiff may sue as a poor person and when counsel shall be assigned by the court," approved July twentieth, eighteen hundred and ninety-two, be, and the same is hereby, amended so as to read as follows:

"That any citizen of the United States entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any

suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the Appellate Court or give security therefor, before or after bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Approved, June 25, 1910.

## EMPLOYEES OF THE UNITED STATES.

[PUBLIC—No. 176.]

[H. R. 21844.]

AN ACT granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That when, on or after August first, nineteen hun-

dred and eight, any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy-yards, or in the construction of river and harbor or fortification work or in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission, is injured in the course of such employment, such employee shall be entitled to receive for one year thereafter, unless such employee, in the opinion of the Secretary of Commerce and Labor, be sooner able to resume work, the same pay as if he continued to be employed, such payment to be made under such regulations as the Secretary of Commerce and Labor may prescribe: *Provided*, That no compensation shall be paid under this Act where the injury is due to the negligence or misconduct of the employee injured, nor unless said injury shall continue for more than fifteen days. All questions of negligence or misconduct shall be determined by the Secretary of Commerce and Labor.

SEC. 2. That if any artisan or laborer so employed shall die during the said year by reason of such injury received in the course of such employment, leaving a widow, or a child or children under sixteen years of age, or a dependent parent, such widow and child or children and dependent parent shall be entitled to receive,

in such portions and under such regulations as the Secretary of Commerce and Labor may prescribe, the same amount, for the remainder of the said year, that said artisan or laborer would be entitled to receive as pay if such employee were alive and continued to be employed: *Provided*, That if the widow shall die at any time during the said year her portion of said amount shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any.

SEC. 3. That whenever an accident occurs to any employee embraced within the terms of the first section of this Act, and which results in death or a probable incapacity for work, it shall be the duty of the official superior of such employee to at once report such accident and the injury resulting therefrom to the head of his Bureau or independent office, and his report shall be immediately communicated through regular official channels to the Secretary of Commerce and Labor. Such report shall state, first, the time, cause, and nature of the accident and injury and the probable duration of the injury resulting therefrom; second, whether the accident arose out of or in the course of the injured person's employment; third, whether the accident was due to negligence or misconduct on the part of the employee injured; fourth, any other matters required by such rules and regulations as the Secretary of Commerce and

Labor may prescribe. The head of each Department or independent office shall have power, however, to charge a special official with the duty of making such reports.

SEC. 4. That in the case of any accident which shall result in death, the persons entitled to compensation under this Act or their legal representatives shall, within ninety days after such death, file with the Secretary of Commerce and Labor an affidavit setting forth their relationship to the deceased and the ground of their claim for compensation under the provisions of this Act. This shall be accompanied by the certificate of the attending physician setting forth the fact and cause of death, or the nonproduction of the certificate shall be satisfactorily accounted for. In the case of incapacity for work lasting more than fifteen days, the injured party desiring to take the benefit of this Act shall, within a reasonable period after the expiration of such time, file with his official superior, to be forwarded through regular official channels to the Secretary of Commerce and Labor, an affidavit setting forth the grounds of his claim for compensation, to be accompanied by a certificate of the attending physician as to the cause and nature of the injury and probable duration of the incapacity, or the nonproduction of the certificate shall be satisfactorily accounted for. If the Secretary of Commerce and Labor shall find from the report and affidavit or other evidence produced by the

claimant or his or her legal representatives, or from such additional investigation as the Secretary of Commerce and Labor may direct, that a claim for compensation is established under this Act, the compensation to be paid shall be determined as provided under this Act and approved for payment by the Secretary of Commerce and Labor.

SEC. 5. That the employee shall, whenever and as often as required by the Secretary of Commerce and Labor, at least once in six months, submit to medical examination, to be provided and paid for under the direction of the Secretary, and if such employee refuses to submit to or obstructs such examination his or her right to compensation shall be lost for the period covered by the continuance of such refusal or obstruction.

SEC. 6. That payments under this Act are only to be made to the beneficiaries or their legal representatives other than assignees, and shall not be subject to the claims of creditors.

SEC. 7. That the United States shall not exempt itself from liability under this Act by any contract, agreement, rule, or regulation, and any such contract, agreement, rule, or regulation shall be *pro tanto* void.

SEC. 8. That all Acts or parts of Acts in conflict herewith or providing a different scale of compensation or otherwise regulating its payment are hereby repealed.

Approved, May 30, 1908.

GRANTING TO CERTAIN EMPLOYEES OF THE UNITED STATES  
THE RIGHT TO RECEIVE FROM IT COMPENSATION FOR  
INJURIES SUSTAINED IN THE COURSE OF THEIR EMPLOY-  
MENT.

MAY 12, 1908.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

MR. ALEXANDER, of New York, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 21844.]

The Committee on the Judiciary have had under consideration the bill (H. R. 21844), granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment, and recommend that the same do pass.

The purpose of this bill is to compensate Government employees engaged in hazardous occupations. Such employment is practically confined to arsenals, navy-yards, manufacturing establishments (such as armories, clothing depots, ship-yards, proving grounds, powder factories, etc.), to construction of river and harbor work, and to work upon the Isthmian Canal. The bill provides that the wages of such an employee who is injured in the course of such employment, without contributory negligence or misconduct, shall be continued for one year unless he is sooner able to resume work. If such an one is killed, or subsequently dies during the year, an amount equal to a year's wages or the remainder thereof is paid in equal portions to his widow, children under sixteen years of age, and dependent mother, or to the survivor or survivors.

All payments are made under the direction of the Secretary of Con-

merce and Labor, who is authorized to pass upon questions of negligence and misconduct and to make such rules and regulations as may be necessary to safeguard the interests of the Government and of the beneficiaries. From his decision no appeal is allowed. Sections 3 to 9 (inclusive) make ample provision for the protection of the Government, requiring notice of accident, investigations, medical examinations from time to time, etc. Section 10 repeals all acts in conflict.

The principle of this measure is not new to our Government. For five years railway postal clerks have been thus compensated, and since May 4, 1882, members of the Life-Saving Service have enjoyed similar benefits. In case of injury a postal clerk is paid his wages for one year, unless sooner able to resume work, ranging from \$800 to \$1,600. If he is killed or dies within one year, his family receives a lump sum of \$1,000. A surfman in the Life-Saving Service, if injured, may receive his wages for two years, unless sooner able to resume work, ranging from \$650 to \$1,560 for the two years. If killed, his family receives a like amount. Under the provisions of this bill a Government artisan or laborer, if injured, receives one



year's wages, unless sooner able to resume work, ranging from \$300 (boys) to \$1,600 (foreman and experts), being an average of about \$800. If killed, his family receives a like amount.

There is insufficient data as to the number and character of accidents occurring to Government employees upon which to base an accurate estimate of the cost under this bill. In the railway mail service there are 14,347 postal clerks, and last year it cost the Government \$98,143.95 because of accidents. The Life-Saving Service employs 1,898 surfmen, and the Government during the last year paid for accidents and deaths \$41,270.51. This amount also includes sums paid for sickness contracted in the service.

There are approximately 6,600 artisans and laborers employed in arsenals, armories, and other manufacturing establishments of the War Department, and during the past ten years eight were killed and forty-one more or less seriously injured. The average absence from work because of these injuries was about two and one-half months. Under this bill the Government would have paid during the ten years a total of about \$20,000, or an average of \$2,000 a year. It ought to be added that the fewness of the accidents arising in the workshops of the War Department is largely due to the excellent condition of the machinery and the discipline exercised by the officers in charge.

The thirty-one navy-yards, naval stations, training stations, and naval magazines under the Navy Department employ approximately 25,000 men, but no statistics are available showing the number of accidents. Under the Isthmian Canal Commission approximately 11,000 men are engaged in hazard-

ous occupations, their wages ranging from \$500 (unskilled laborers) to \$2,200 (locomotive engineers). During the calendar year 1907 there were 142 accidents resulting in death and approximately 1,300 treated in the hospitals. As no statistics are available showing the wages received by those killed or injured, no estimate can be made of the probable cost of compensation under this bill. The number of injured in proportion to those employed is very large, although it is likely that many accidents were slight and many due to the contributory negligence of the employees.

The Government in its river and harbor work employs approximately 12,800 artisans and laborers, their wages ranging from \$400 to \$3,600, with an approximate average of \$1,200. The perfect machinery and the discipline exercised over the employees have resulted in a very few accidents, seventy-five approximately having occurred since and including the year 1894. Of those injured only two were killed and one died.

The bill covers approximately 55,400 employees out of a total of 337,751 connected with the classified and unclassified civil service of the United States. If to this amount be added the postal clerks and members of the Life-Saving Service, the aggregate who may be cared for, if injured, will be increased to 71,600.

This measure is not as comprehensive or as liberal as many desire. Bills have been introduced extending relief to all employees of the Government. Some of these bills exclude negligence; others allow actions to be brought in Federal courts, with and without limitation as to the amount recoverable; others, following the rule of compensation adopted in this



measure, double and treble the amount to be paid in case of injury or death. Nevertheless, it has seemed wise to the committee to confine compensation so far as possible to hazardous occupations, and to adhere not only to the system already adopted by the Treasury and Post-Office Departments, but to dispense relatively about the same amount of relief.

This plan, uniformly advocated by such employees of the Government as appeared before the committee, seems to be much more satisfactory because it gives food to the family at a time when the employee cannot earn wages. Indeed, a strong feeling was evidenced at the hearings that some less expensive system of compensating accidents should be adopted than the lawsuit, which involves delay, produces uncertainty, withholds money when most needed, and works other hardships. What the injured employee seems to desire is to have his family supported while he is unable to earn wages, and he seems to prefer to take a less amount, to be used at such a time, than to await the result of a slow lawsuit, even though it may, if he succeeds, bring him two or three times as much.

Several of the governments of Europe have adopted this system of compensation. Under the provisions of the English workmen's compensation Act of 1897 an employee of the Government, if injured, receives for a period not exceeding six months one-half his average weekly earnings during the previous twelve months; if killed, his family receives an amount ranging from \$730 to \$1,460.

In France certain Government employees in state, departmental, and communal establishments are paid two-thirds of their annual

wages for permanent total disablement and one-half for temporary disability, besides medical and surgical benefits. When death occurs, those dependent upon him receive sixty per cent. of his annual wages until the widow remarries and until the children reach the age of sixteen.

In Germany employees of the Government in the industrial establishments of the army and navy and in the postal, telegraph, and railway service receive for total disability from one-half to two-thirds of their daily wages and a less amount for partial disability. In case of death dependents receive sixty per cent. of their wages until widow remarries, etc.

Similar compensation is provided in Austria and other European countries. The money so paid seems to be derived for the most part from accident insurance, for which the governments pay in whole or in part. In Austria, for illustration, an employee receives sixty per cent. of his wages for the first four weeks from the required sick benefit insurance, for which the employee pays two-thirds and the Government one-third; thereafter during disability he receives the same amount from the required accident insurance fund, of which the employee pays ten per cent. and the Government ninety per cent. In Belgium employees of the Government are compensated under the compulsory accident insurance law, the Government paying the whole premium. The entire cost under the workmen's compensation Act of France is borne by the Government. In Germany sickness and accident insurance is compulsory, except in the case of soldiers and other excepted classes, which are otherwise provided for.

## APPENDIX B.

### REPORT OF HOUSE JUDICIAL COMMITTEE ON FEDERAL EMPLOYES' LIABILITY ACT.

The Committee on the Judiciary, to whom was referred House Bill 20310, have had the same under consideration, and report it to the House with a recommendation that it pass.

This bill relates to common carriers by railroad engaged in interstate and foreign commerce and in commerce in the District of Columbia, the Territories, the Canal Zone, and other possessions of the United States. It is intended in its scope to cover all commerce to which the regulative power of Congress extends.

The purpose of this bill is to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employee, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employee for an injury caused by the negligence of a co-employee; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires each to bear the burden thereof. The bill also provides that, to the extent that any contract, rule, or regulation seeks to exempt the em-

ployer from liability created by this act, to that extent such contract, rule or regulation shall be void.

Many of the States have already changed the common-law rule in these particulars, and by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees.

Sections 1 and 2 of this bill provide that common carriers by railroad, engaged in interstate and foreign commerce, in commerce in the District of Columbia, the Territories, the Panama Canal Zone, and other possessions of the United States, shall be liable to its employees for personal injuries resulting from its negligence or by reason of any defect or insufficiency due to its negligence in its roads, equipment, or methods. It is not a new departure, but rather goes back to the old law which made the master liable for injury occasioned by the negligence of his servant, either to a co-servant or to a third person.

The doctrine of fellow-servant was first enunciated in England in 1837, and since that time it has been generally followed in that country and this, except where abrogated or modified by statute. Whatever reason may have existed for the doctrine at the time it was first announced, it can not be said to exist now, under modern methods of commerce by railroad. It is possible that a century ago, under industrial methods and systems as they then existed, co-employees could have some influence over each other tending to their personal safety. It is possible that they could know something of the habits and characteristics of each other. Under present industrial methods and systems this can not be true. Then they worked with simple tools and were closely associated with each other in their work. Now they work with powerful and complex machinery, with widely diversified duties, and are distributed over larger areas and often widely separated from each other. Under present methods, personal injuries have become a prodigious burden to the employees engaged in our industrial and commercial systems.

The master should be made wholly responsible for injury

to the servant by reason of the negligence of a co-servant. He exercises the authority of choosing the employees and if made responsible for their acts while in line of duty he will be induced to exercise the highest degree of care in selecting competent and careful persons and will feel bound at all times to exercise over employees an authority and influence which will compel the highest degree of care on their part for the safety of each other in the performance of their duties.

These sections make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances used in the operation of railroads. Over these things the employee has absolutely no authority. The employer has complete authority over them, both in their construction and in their maintenance. It is a very hard rule, indeed, to compel men, who by the exigencies and necessities of life are bound to labor, to assume the risks and hazards of the employment, when these risks and hazards could be greatly lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work. We believe that a strict rule of liability of the employer to the employee for injuries received for defective machinery will greatly lessen personal injuries on that account. The common-law rules of fellow-servants and assumption of risk still prevail in many of the States, and without any apparent good reason. In recent years many of the countries of Europe have adopted new rules of liability, which greatly relieve the harshness of the common law as it still exists in some of the States.

In 1888 England passed an act which abolished the doctrine of fellow-servant with reference to the operation of railroad trains, and in 1897 it extended this law to apply to many of the hazardous employments of the country.

For many years the doctrine in Germany has been yielding step by step to better rules, until for the last quarter of a

century it does not apply to any of the hazardous occupations.

In 1869 Austria passed a law making railroad companies liable for all injuries to their employees except where the injury was due to the victim's own negligence.

The Code Napoleon made the employer answerable for all injuries received by his workmen, and this code is still in force in Belgium and Holland.

Other European countries have from time to time made laws fixing the liability of the master for damages caused by the negligent act of his servant.

Many of the States have passed laws modifying the doctrine as changing conditions required it and justice to the employee demanded it.

Alabama in 1885 eliminated the doctrine so far as it relates to railroads, and in other particulars.

Arkansas in 1893 qualified the doctrine as to railroad employment.

Georgia in 1856 entirely abolished the doctrine as to railroads.

Iowa abolished it as to train operatives in 1862.

Kansas did the same thing in 1874.

The latest statute in Wisconsin on the subject abolished the fellow-servant doctrine as to employees actually engaged in operating trains.

Minnesota did the same thing in 1887.

Florida, Ohio, Mississippi, and Texas have changed the doctrine to the advantage of the employee.

North Carolina, North Dakota, and Massachusetts have practically eliminated the doctrine as regards the operation of railroad trains.

Colorado in 1901 abolished the doctrine in toto.

Other States have either abolished it or modified it as regards the operation of railroads.

As compared with the law now in force in other countries and in many of the States, the changes made in the law of fellow-servant by this bill are not radical. The doctrine as



regards the hazardous occupations is being relegated everywhere.

A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States.

It is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads. As it is now, where the doctrine of fellow-servant is in force, no one is responsible for the injury or death of an employee if caused by the carelessness of a co-employee. The co-servant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible, and hence the injury is not compensated. The employee is not held by the employer to such strict rules of caution for the safety of his co-employee, because the employer is not bound to pay the damages in case of injury. If he were held liable for damages for every injury occasioned by the negligence of his servant, he would impose the same strict rules for the safety of his employees as he does for the safety of passengers and strangers. He will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be the stronger inducement to the employee to act with a higher regard for the safety of his fellow-workmen.

Section 3 is a modification of the common-law rule of contributory negligence. It does not abolish the law. Under its provisions contributory negligence still bars a recovery for personal injury so far as the injury is due to the contributory negligence of the employee, but entitles the employee to recover for the injury so far as it is due to the negligence of the employer. It differs from the Act passed by Congress in June, 1906, on this point, in this: That law provided that contributory negligence did not bar a recovery if the negligence of the employee was slight and that of the employer

was gross in comparison. That law modified the common-law rule of contributory negligence and also contained a modification of the common-law doctrine of comparative negligence. We are unable to see any justification whatever in the common-law doctrine of comparative negligence anywhere. It is the only rule of negligence that permits an employee to recover damages for injury to which his own negligence contributed. Comparative negligence is absolutely wrong in principle, for the reason that it permits the employee to recover full damages for injury, even though his own negligence contributed to it. It is true, as the law states it, he can only recover damages when his contributory negligence is slight and that of the employer is gross in comparison. But that rule does not undertake to diminish the verdict in proportion to the negligence of the employee. This may be said in behalf of the doctrine of contributory negligence in its common-law purity, and it is the only reason, so far as we know, that has ever been assigned for its existence: It tends to make the employee exercise a higher degree of care for his own safety.

If that is a good reason for the existence of that rule, then we believe that Section 3 of this bill is a very great improvement on that doctrine, for the reason that it imposes the burden of the employer's negligence on the employer, and he will thus be induced to exercise higher care in the selection of his employees, and in other ways, for the safety of persons in his employment. If the law imposes on the employee the burden of his own negligence, that is certainly sufficient, and that is what this section seeks to do, and it also seeks to impose upon the employer the burden of his negligence. It provides that contributory negligence shall not bar a recovery for injury due to the negligence of the employer. It provides that the jury shall diminish the damages suffered by the injured employee in proportion to the amount of negligence attributable to such employee.

It is urged by some that such a provision is impracticable of administration and that juries will not divide the damages in accordance with the negligence committed by each. The

same objection can be urged against the provision of the bill passed by Congress in 1906, which provided that only slight negligence should not bar a recovery, but that the jury should diminish damages in proportion to such slight negligence. Under that provision the jury would have the same difficulty, if any, in apportioning the damages according to the negligence of each party. We submit, further, that this section of the bill is free from the very unjust principle contained in the common-law doctrine of comparative negligence which allowed the employee to recover full damages for injury to which his own negligence contributed in some degree. It is not a just criticism of a law, conceding the righteousness of its principles, to say that it is impracticable of administration. We submit that the principle in this section is ideal justice, against which no fair argument can be made. It is better that legislatures pass just and fair laws, even though they may be difficult of administration by the courts, rather than to pass unjust and unfair laws because they may be more easily administered by the courts. Courts ought not to be compelled to administer the common-law doctrine of contributory negligence, which puts upon the employee the whole burden of negligence, even though his negligence was slight and that of the employer was gross. That law might to some extent induce higher care on the part of the employee, but in the same degree, and for the same reason, it induces the employer to have less regard and less care for the safety of his employees.

It is urged that juries under this law will wholly ignore the negligence committed by the employee and charge all the injury to the negligence of the employer. We do not believe that this will be the result of the administration of this section. We believe it will appeal to juries as eminently just and they will undertake to enforce it literally to the best of their skill. If juries under the common-law rule of contributory negligence have been disposed to assess damages in spite of the fact that the defendant contributed to the injury by his own negligence, it may be said that the jury recognizes

the injustice of the law and undertakes to correct it by what they consider a just and righteous verdict. There is nothing in this law that will induce such a sentiment in the minds of the jury, but it will appeal to them as the true principle, and, in our judgment, they will seek to apply it fairly in the courts.

Beach, in his work on contributory Negligence, page 136, comments on the law as provided in this section as follows:

"Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages in those cases which frequently arise, wherein, on one hand, a real injury has been suffered by the plaintiff by reason of the culpable negligence of the defendant, and yet, where, on the other hand, the plaintiff's conduct was such as to some extent contribute to the injury, but in so small a degree that to impose upon him the entire loss seems not to take a just account of the defendant's negligence. In those cases, which may be denominated 'hard cases,' the Georgia and Tennessee rule in mitigation of damages without necessarily sacrificing the principle upon which the law as to contributory negligence rests is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule, as laid down in *Davis v. Mann*, would impose the whole liability upon the defendant, it is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties."

Shearman and Redfield on the Law of Negligence, fifth edition, page 158, in speaking of this rule, say:

"This is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it."

The United States has adhered much closer to the common-law doctrine of contributory negligence than the leading countries of Europe. The laws of England, Germany, and



Italy go much further to discharge the employee from the responsibility of his own act than does the common-law doctrine of comparative negligence.

The laws of France, Switzerland, and Russia are in practical accord with the provisions of section 3 of this bill.

The rule provided for in this section is recognized to some extent in this country. Maryland and some of the other States have passed statutes seeking to divide the responsibility where both parties are guilty of negligence.

The provisions of this section are certainly just. What can be more fair than that each party shall suffer the consequences of his own carelessness? It certainly appeals more strongly to the fair mind than the proposition that the employee shall have no redress whatever, even though his injury is due mainly to the negligence of another. As a consequence of this legislation, we believe there will be fewer accidents. By the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety.

The proviso in section 3 is to the effect that contributory negligence shall not be charged to the employee if he is injured or killed by reason of the violation, by the employer, of any statute enacted for the safety of employees. The effect of the provision is to make a violation of such a statute negligence *per se* on the part of the employer. The courts of some States have held this as a principle of the common-law. Other States have enacted it into statute.

Section 4 provides, in effect, that the employee shall not be charged with the assumption of risk in case he is injured by reason of the violation of the employer of a statute enacted for the safety of employees. This section likewise makes the violation of such a statute negligence *per se* on the part of the employer, and is already the law in many of the States of the Union.

Section 5 renders void any contract or rule whereby a common carrier seeks to exempt itself from liability created by this act. Many of the States have enacted laws making void



such contracts and regulations, and, so far as we are informed, these statutes have been sustained by the courts. The following States have incorporated into their statutes language similar to the language contained in this bill on this question: Arkansas, California, Colorado, Florida, Georgia, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming. The Supreme Court of Ohio held that a contract exempting a railroad company from liability for injuries was void under the common law as against public safety. Likewise the Supreme Court of Arkansas and the court of appeals of Virginia have held the same doctrine. The Courts of New York have held that such contracts, though based on a consideration, are void as against public policy. The statutes of Ohio and Iowa fixing the liability of employer to employees, containing provisions similar to this section, have been held constitutional by the Federal Courts, although the cases in which these decisions were rendered did not expressly turn on that question. The courts of Alabama have held such contracts void, regardless of statute. In Georgia and Pennsylvania such contracts have been held valid, but since the decision in Georgia that State has adopted a statute making them void.

This provision is necessary in order to make effective sections 1 and 2 of the bill. Some of the railroads of the country insist on a contract with their employees discharging the company from liability for personal injuries.

In any event, the employees of many of the common carriers of the country are to-day working under a contract of employment which by its terms releases the company from liability for damages arising out of the negligence of other employees. As an illustration we quote one paragraph from a blank form of application for a situation with the American Express Company, and entitled "Rules governing employment by this company:"

"I do further agree, in consideration of my employment by

said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents, or employees, or otherwise; and that in case I shall at any time suffer any such injury, I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury or connected therewith or resulting therefrom; and I hereby bind myself, my heirs, executors, and administrators, with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith."

While many of the States have enacted statutes making such contracts void, yet the United States Supreme Court, there being no Federal statute on the subject, have held a similar contract valid in the case of *Voigt v. Baltimore and Ohio Southwestern Railroad* (176 U. S., p. 498). In this case the railroad company entered into a contract with an express company whereby it agreed to carry the business of the express company, to furnish it with cars and certain facilities over its road, and to carry its messengers, in consideration of which the express company agreed to save harmless the railroad company for all claim for damages for personal injury received by its employees, whether the injuries were caused by the negligence of the railroad company or otherwise.

Voigt entered the service of the express company as messenger, and by the contract of his employment he agreed to assume all the risk of accident and injury and to indemnify and save harmless the express company from all claims that might be made against it for injury he might suffer, whether resulting from negligence or otherwise, and to execute a release for the same.

Voigt was injured and sued. The court said:

"He was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy."

In the case of *O'Brien v. C. and N. W. Ry. Co.* (Fed. Rep. vol. 116, p. 502), which involved the statute of Iowa making such contracts invalid, the court said:

"That while such contracts would be effective to protect the railroad company from liability at common-law, under such statutory provisions declaratory of the public policy of the State they were invalid and constituted no defense to an action against it for the death of the messenger occurring in the State of Iowa by reason of the wrecking of the express car in which he was employed, through the negligence and want of ordinary care of defendant or its servants, whether the messenger be regarded as an employee of the defendant or not."

This section of the bill, however, provides that the common carrier may set off against any claim for damages whatever it has contributed toward such insurance, relief benefit, or indemnity that may have been paid to the injured employee, which would seem to be entirely fair and all that ought to be required of the employee.

Some of the roads of the country have established what are called "relief departments," which seek to operate a species of insurances for the employee against the hazards of the employment, but, so far as we know, all their forms of contracts, used by these relief departments to insure the employee, discharge the company from every possible liability for personal injuries to the employee. This release is made by its terms of agreement in consideration of the contributions of the company to the relief fund.

The following is one of the paragraphs from the form of application for membership in the relief department used by the Baltimore and Ohio Railroad Company:

"I further agree that, in consideration of the contributions of said company to the relief department and of the guaranty by it of the payment of the benefits aforesaid, the acceptance of benefits from such relief feature for the injury or death shall operate as a release of all claims against said company, or any company owning or operating its branches or divisions, or any company over whose railroad, right of way, or property the said Baltimore and Ohio Railroad Company or any company owning or operating its branches or divisions shall have the right to run or operate its engines or cars or send its employees in the performance of their duty, for damages by reason of such injury or death which could be made by or through me; and that the superintendent may require, as a condition precedent to the payment of such benefits, that all acts by him deemed appropriate or necessary to effect the full release and discharge of the said companies from all such claims be done by those who might bring suit for damages by reason of such injury or death; and also that the bringing of such a suit by me, my beneficiary or legal representative, or for the use of my beneficiary alone, or with others, or the payment by any of the companies aforesaid of damages for such injury or death recovered in any suit or determined by a compromise or any costs incurred therein, shall operate as a release in full to the relief department of all claims by reason of membership therein."

The form of other application used by other companies are similar in terms to the cited, and make acceptance of benefits from said fund a release of all claims for damages for injury or death.

By an act concerning common carriers engaged in interstate commerce and their employees, approved June 1, 1898, known as the "arbitration law," it is made a misdemeanor on the part of any employer subject to the provisions of that act:

"To require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment

shall agree to contribute to any fund for charitable, sociable, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit arising from the employer's contribution to such fund."

We believe this bill meets the objections of the Supreme Court to the act of June 11, 1906, known as the "employers' liability act" in the case of *Howard, administratrix etc., v. Illinois Central Railroad Company, et al.* 6 Cong. Record, 1st Sess. pp. 4434-4436.

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## HOUSE REPORT ON AMEND- MENTS OF 1910.

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### LIABILITY OF COMMON CARRIERS TO THEIR EM- PLOYEES IN CERTAIN CASES.

FEBRUARY 22, 1910.—Referred to the House Calendar and ordered to be printed.

MR. STERLING, from the Committee on the Judiciary, submitted the following

#### REPORT.

[To accompany H. R. 17263.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 17263) to amend an act entitled, "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, having had the same under consideration, beg leave to report it to the House with a recommendation that the bill do pass.

In considering the advisability of amending the act entitled "An act relating to the liability of common carriers by



railroads to their employees in certain cases," approved April 22, 1908, it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act.

The effect of decisions of cases so far adjudicated under the act has been in general to recognize the true intent of Congress and to extend and make more ample the right to recover damages for death or injury to interstate servants, yet in some particulars its operation has been to limit a recovery which otherwise would have been open to the employee or his representative.

One result of the passage of the law may be to nullify state laws affording a remedy in certain cases for death or injury in railroad service. The state laws which had been operative and which were valid even in their application to those engaged in service in interstate commerce appear to have been rendered, as to interstate servants, ineffective when Congress acted upon this subject. That this seems to have been the effect of the passage of this law was expressly decided in a well-considered opinion by Judge Rogers in the case of *Fulgam v. Midland Valley R. Co.* (167 Fed., 660, p. 662):

It is clear that the act of April 22, 1908, *supra*, superseded and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not

only injuries sustained by employees engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive.

All state legislation on that subject must give way before that act (*Miss. Railroad Commission v. Ill. Cent. R. R. Co.*, 203 U. S., 335; 27 Sup. Ct., 90; 51 L. Ed., 209; *Sherlock et al. v. Alling*, administrator, 93 U. S., 104; 23 L. Ed., 819.) These last cases serve to show that, until Congress has acted with reference to the regulation of interstate commerce, state statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject state legislation must yield.

In *Gulf, Colorado, etc., Railroad Co. v. Hefley* (158 U. S., 99; 19 Sup. Ct., 804; 39 L. Ed., 910) the court said:

"When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way."

When Congress acted upon the subject of the regulation of the liability of interstate carriers for injuries to their servants engaged in interstate commerce, "the State was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from State competency." (*Wisconsin v. C. M. & St. P. Ry. Co.*, 117 N. W., 686.)

In the course of his opinion in the case above cited, Justice Dodge, delivering the unanimous opinion of the Supreme Court of Wisconsin, very clearly stated this doctrine and the authority upon which it was based, as follows:

Within the field of authorized congressional action the federal power must, in the nature of things, be supreme in all parts of the United States. "This Constitution, and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." (Art. VI, par. 2, Const. U. S.). In *Cooley v. Board of Wardens* (12 How., 299, 318), it was said of this class of legislation: "It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the

absence of congressional legislation." In *Pennsylvania v. Wheeling, etc., Co.* (18 How., 431), where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge, "if Congress chooses to act, its action necessarily precludes the action of the State."

In *United States v. Colorado & N. W. R. Co.* (157 Fed. Rep., 321, 330), Sanborn, J., remarks:

"The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power can not be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary in order to regulate interstate commerce fully and effectually. \* \* \* That power is not subordinate, but is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail and the latter must give way." (See also *Gibbons v. Ogden*, 9 Wheat., 1, 209, 210.)

It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a State will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject, the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the States of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the State to exercise that authority which by the Constitution of the United States was surrendered to the Federal Government when and if Congress deemed its exercise advisable.

In a recent decision of the court of civil appeals, State of Texas, the court unanimously stated this doctrine as follows:

It is well settled that the power of Congress to regulate interstate commerce under the provisions of the Constitution before mentioned is plenary and includes the power to prescribe the qualifications, duties, and liabilities of employees of railway companies engaged in interstate commerce, and any legislation by Congress on such subject supersedes any state law upon the same subject. (*Railway Co. v. Alabama*, 128 U. S., 99; *Howard v. Railway Co.*, 207 U. S., 463.)

The constitutional right of Congress to legislate upon this subject having been exercised by that body, the right of the State to invade this field of legislation ceased, or, at all events, no act of a state legislature in conflict with the act of Congress upon the same subject can be held valid. The supreme courts of Missouri and Wisconsin in passing upon the validity of statutes of said States similar to the act we are considering, hold such statutes void upon the ground of conflict with the act of Congress before mentioned. (*State v. Mo. Pac. Ry. Co.*, 111 S. W., 500; *State v. C. M. & St. P. Ry. Co.*, 117 N. W., 686.)

Judge Cooley, in his work on *Constitutional Limitations*, seventh edition, 856, said:

It is not doubted that Congress has the power to go beyond the general regulation of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by these directions, the exercise of state power is excluded.

It is therefore undoubtedly the law that congressional action upon the liability of carriers engaged in interstate commerce, for injuries to their employees, supersedes all state legislation upon the same subject, and renders them, as long as the Federal law remains in operation, of no avail as providing a legal remedy.

Many of the States provide by statute for the survival of any action which the deceased may have had for the injury to his estate, and for any expenditures during his lifetime resulting from the injury.

In the phraseology of the existing Employers' Liability Act—that is, the Act of April 22, 1908—the expression used is, as to the question now under consideration:

Shall be liable in damages \* \* \* in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, employees, \* \* \*.”

In the case of *Fulgam v. Midland Valley R. R. Company*, hereinbefore cited, the court said:

In the opinion of the court, right of action given to the injured employee by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, at common law, perishes with the injured person.

In the case of *Walsh, admx., v. New York, New Haven and Hartford Railroad Company*, Circuit Judge Lowell, who delivered the opinion of the court, said in a case arising under the Employers' Liability Act of April 22, 1908, after quoting the case of *Fulgam v. Midland Valley R. R. Co.* (167 Fed., 660):



The defendant has further demurred to counts one and four, contending that the employee's cause of action to recover for his conscious suffering did not survive to his administratrix, although the existence of some of the statutory relatives was alleged. As the cause of action is given by a federal statute, this court can not have recourse to a state statute in order to determine whether the cause of action survives or not. (*Schreiber v. Sharpless*, 110 U. S., 76, 80; *B. & O. R. R. v. Joy*, 173 U. S., 226, 230; *U. S. v. DeGoer*, 38 Fed., 80; *U. S. v. Riley*, 104 Fed., 275.) Revised Statutes, section 955, provides that "When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." This section does not itself provide what causes of action shall survive, but in the absence of other controlling statute leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable. There is no general federal statute, and the particular statute in question, the act of 1908, says nothing about survival.

Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive and so that counts one and four are demurrable. (*Fulgam v. Midland Valley Co.*, 167 Fed., 660.) The court is justified in saying that this result has been reached with reluctance. The maxim "*Actio personalis moritur cum persona*" has not always commended itself. (*Pollock on Torts*, Webb's ed., p. 71.) The survival of the cause of action in this case is allowed by the statutes of many States. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrongdoer, should, as to his own estate, be deprived of this remedy by the delays of the law, or without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems to me, as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the legislature has established the rule in this case.

The language of the statute should be made clear so that the uncertainty and obscurity suggested by Judge Lowell would be removed. So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear.

It certainly should be as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject.

NOTE.—The remainder of this report is incorporated in that of the Senate's following.



## SENATE REPORT ON AMENDMENTS OF 1910.

### AMENDING EMPLOYERS' LIABILITY ACT.

March 22, 1910.—Ordered to be printed.

MR. BORAH, from the Committee on the Judiciary, submitted the following

#### REPORT.

[To accompany H. R. 17263.]

The Committee on the Judiciary, having under consideration House bill 17263, reports as follows:

It is of importance at the outset that Congress give careful and serious consideration to remedying any defects in the practical operation of the Employers' Liability Law from time to time as such defects are developed by proceedings in court. This serious attention seems demanded because the good faith of Congress in passing the original act has been made the subject of attack in a publication which has been given wide circulation among railroad counsel of the country. At page 83 of this publication entitled, "Unconstitutionality of the Federal Employers' Liability Act," published by the Price, Lee & Adkins Company, in the course of an argument of Mr. Edward D. Robbins, general counsel of the New York, New Haven and Hartford Railroad Company, in two cases, *Mondou v. New York, New Haven and Hartford Railroad Company* and *Hoxie v. New York, New Haven and Hartford Railroad Company* (73 Atl. Rep., 754), appears the following:

Does any member of this court believe that this statute would ever have been passed except on the eve of a presidential election under the influence of the great railway unions of this country? If this act did not have so many votes behind it, would the executive department of the United States be here, participating in private litigation, for the purpose of defending its constitutionality?

If there ever was a case in which the courts might properly be appealed to, to set up the fundamental "law of the land" as a bulwark against the arbitrary exercise of power by a Democratic majority and by elected Representatives who fear that majority, I think this is that case.

We may remark in passing that this gratuitous statement could have no proper place in a legal discussion, for the Supreme Court of the United States said in the McCray case (196 U. S., 27)—

the decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.

As such an argument could receive no recognition from any court as a basis of judicial action, as has been pointed out by the Supreme Court in the McCray case, it is strange that it should find its place in the presentation of a serious matter to a court. This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the Employers' Liability Law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to train men of the interstate railroads of the United States for the year 1908 was 281,645.

It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress to shift the burden of the loss resulting from these casualties from "those least able to bear it," and place it upon those who can, as the Supreme Court said in the Taylor case (211 U. S., 281), "measurably control their causes."

The passage of the original act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to radically change as far as congressional power can extend, those rules of the common law which the President in a recent speech at Chicago characterized as "unjust." President Taft in his address at Chicago, September 16, 1909, referred "to the continuance

of unjust rules of law exempting employers from liability for accidents to laborers."

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident to meet the modern industrial conditions, and is based not alone upon the failure of these rules in the United States, but their failure in other countries as well. Mr. Asquith, present prime minister of England, said:

It was revolting to sentiment and judgment that men who met with accidents through the necessary exigencies of daily occupation, should be a charge upon their own families.

The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject. In the message President Roosevelt said:

The practice of putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice in which the United States stands in unenviable prominence. In both our federal and our state legislation we have, with few exceptions, scarcely gone farther than the repeal of the fellow-servant principle of the old law of liability, and in some of our States even this slight modification of a completely outgrown principle has not yet been secured. The legislation of the rest of the industrial world stands out in striking contrast to our backwardness in this respect. Since 1895 practically every country in Europe, together with Great Britain, New Zealand, Australia, British Columbia, and the Cape of Good Hope has enacted legislation embodying in one form or another the complete recognition of the principle which places upon the employer the entire trade risk in the various lines of industry.

In the second volume of Labatt on "Master and Servant," at page 1325, the learned author, after an able discussion of the reasons given by the courts of the doctrine denying a remedy to servants injured by the negligence of fellow-servants, says:

It would appear, therefore, that the doctrine of common employment stands in the singular predicament that it rests very largely, if not entirely, upon a basis of suggested facts which we are asked to accept upon the mere ipse dixit of a certain number of gentlemen who have

attained greater or less distinction in a profession which, to say the very least, does not specially qualify them to form a reliable opinion in respect to the subject-matter.

This situation, which would, in any event, be extremely unsatisfactory, is reduced to something like an absurdity by the fact that the judicial theory as to the supposed inevitable consequences of allowing servants to recover for the negligence of their coemployees has long since been exploded by the logic of actual occurrences, the significance of which is unmistakable. In England and her colonies, as well as in America, statutes have been passed which have greatly restricted the operation of the doctrine of common employment. (See Chapters XXXVII-XL, post.) No one would have the hardihood to maintain, in the absence of any specific evidence pointing to that conclusion, that, as a result of the legislation, servants have become to a marked degree less careful and efficient, or that industrial development has been crippled and retarded to an appreciable extent. The practical inference is manifest. If, in countries where the doctrine of common employment has been more or less circumscribed, none of the evil results which it is declared to have obviated can be detected, it may be safely concluded that no harm would have been produced if the doctrine had never been applied, and that no harm will result if it should be entirely abrogated by the legislatures, the only authority by which such a change in the law can now be effected.

This general consideration of the importance of the subject involved in the legislation and the justice of the rule which Congress has established upon this subject is introductory to the specific questions involved in the pending measure. These questions have been so thoroughly covered and fully treated by the report of the House committee that we quote and adopt quite fully the discussion on that subject in the House committee report.

The proposed amendments to the employers' liability bill may be considered under three heads: First, as to the venue of such an action; second, as to the concurrent jurisdiction of the courts of the several States; and, third, as to the survival of the right of action.

(1) As to venue. The amendment proposed as to inserting in section 6 after the words therein, "that no such action shall be maintained under this act unless commenced within two years from the day cause of action accrued," the following:

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of either plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of the commencement of such action.



In his special message of January 7, 1910, President Taft, after referring to a proposed amendment to give the Interstate Commerce Commission power to determine the uniform construction of sill steps, ladders, hand brakes, etc., said:

The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any place other than that of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law.

[NOTE.—This is copied verbatim by the Senate from the House report until the Survival of Actions is discussed.]

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#### AMENDMENT AS TO JURISDICTION—PLACE WHERE SUIT MAY BE BROUGHT.

This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an "inhabitant."

This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was issued. This may be at a place in a distant State from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned.

The extreme difficulty, if not impossibility, of a poor man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances.

That such is the state of law is established by reference to the case of *Cound v. Atchison, Topeka and Santa Fe Railway Company*, decided November 6, 1909, in the United



States Circuit Court for the El Paso division of the western district of Texas by Judge Maxey. Judge Maxey in the case before him sustained the railroad's plea to the jurisdiction and dismissed a suit brought in Texas under the Employers' Liability Act on the ground that there was diversity of citizenship in a suit based on a law of the United States.

In his opinion Judge Maxey says:

Referring to the statute and eliminating the federal feature of the present case, the jurisdiction of the court would be clear beyond controversy, since in that case the jurisdiction would be founded only on the fact of diverse citizenship. But here there appear two sources of jurisdiction, the one founded on diverse citizenship and the other upon the fact that the suit arises under a law of the United States. In the former case the statute authorizes suit to be brought in the district of the residence of either the plaintiff or the defendant, where the jurisdiction is founded only on the fact that the action is between citizens of different States; while in the latter suit must be brought in the district of which the defendant is an inhabitant.

The position taken by Judge Maxey in the case just cited is fortified by the opinion of the Supreme Court of the United States in the case of *Macon Grocery Co. v. Atlantic Coast Line Railroad et al.*, decided within a few weeks.

It seems clear from these decisions that a suit in a Federal court under this law, where jurisdiction is founded on the fact that the case involves a Federal statute, must be brought in the district of which the defendant is an inhabitant.

No argument is necessary to convince that this is a grave injustice to the plaintiff.

Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a Federal court on a right based on the law of the United States.

But to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting their case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist.

## CONCURRENT JURISDICTION OF STATE COURTS.

It is proposed to further amend the act by making the jurisdiction of the courts of the United States "concurrent with the courts of the several States."

This is proposed in order that there shall be no excuse for courts of the States to follow in the error of the Supreme Court of errors of Connecticut in the case of *Hoxie v. N. Y. N. H. & H. R. R. Co.* (73 Atlantic Rep., 754), in which case the court declined jurisdiction upon the ground, *inter alia*, that Congress did not intend that jurisdiction of cases arising under the act should be assumed by state courts.

It is clear under the decisions of the Supreme Court of the United States that this conclusion of the Connecticut court is erroneous. And the reasons recited by the Connecticut court lead to an opposite conclusion from that which the opinion declares upon the subject. But no harm can come, and much injustice and wrong to suitors may be prevented by an express declaration that there is no intent on the part of Congress to confine remedial actions brought under the Employers' Liability Act to the courts of the United States.

In declaring that the jurisdiction of the United States courts shall be "concurrent with the courts of the several States," Congress is clearly within its rights and powers.

The first precedent for such declaration is found in the action of the First Congress. In the act of September 24, 1789, it was enacted that the district courts of the United States —

shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. (c) And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars (U. S. Stat. L., Vol. I, p. 77).

This precedent has repeatedly been followed in Federal legislation. Thus early was it established by those who understood the full scope and operation of the Constitution of the United States, that the "supreme law of the land" did not

lose any of its imperative obligation at the door of a state court.

The express declaration of the United States Constitution says of laws enacted by Congress in pursuance of its delegated powers, "and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

This declaration of the Constitution is not meaningless. That the "judges in every State shall be bound" by a Federal law imposes a binding duty to enforce it.

This provision leaves no discretion to a judge of a state court to deny justice to a suitor because his right is based on a Federal law.

The Connecticut court says that this Federal statute known as the Employers' Liability Act, "would also compel courts established by a sovereign power, and maintained at its expense for the enforcement of what is deemed justice, to enforce what it deemed injustice." We may disregard for the moment the suggestion of the injustice of a particular statute. The local opinion of the justice of a particular law is no obstacle to its enforcement if it be a binding law. We will therefore consider the proposition solely as if the factor of local opinion as to its justice was eliminated from controversy. A court may err in its estimate of what its state really did "consider injustice."

Does the fact that state courts are "established by a sovereign power and maintained at its expense" permit denial of enforcement in such courts of a right founded on a Federal statute?

This question is squarely answered in a case which, strangely enough, is cited by the court in the Hoxie case. (*Clafin v. Houseman*, 93 U. S., 130.) In this case Mr. Justice Bradley says:

The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws.

Chancellor Kent, in his Commentaries (1 Com., 400), says:

In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter.

To quote from Cooley's Principles of Constitutional Law, pages 32-33:

A state law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the "supreme law" was adopted or enacted afterwards. The same is true of any provision in the constitution of any State which is found to be repugnant to the Constitution of the Union. And not only must "the judges in every State" be bound by such supreme law, but so must the State itself, and every official in all its departments, and every citizen.

And in the notes, pages 33-35, we read:

The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it (*Tennessee v. Davis*, 100 U. S., 257, per Strong, J.; see also *In re Debs*, petitioner, 158 U. S., 564; *Logan v. United States*, 144 U. S., 263; \* \* \* *Dodge v. Wolsey*, 18 How., 331; *Jefferson Branch Bank v. Skelly*, 1 Black., 436; *Cummings v. Missouri*, 4 Wall., 277; *Railroad Co. v. McClure*, 10 Wall., 511; *White v. Hart*, 13 Wall., 646; *Gunn v. Barry*, 15 Wall., 610; *Pacific Railroad Co. v. Maguire*, 20 Wall., 36; *St. Louis, &c., Ry. Co. v. Vickers*, 122 U. S., 369.) A state can not control the conduct of an agency of the Federal Government within its limits, if the result would be a conflict with national law or an impairment of the efficiency of the agency. (*Davis v. Elmira Savings Bank*, 161 U. S., 275; *McClellan v. Chipman*, 164 U. S., 347. Compare *Reagan v. Mercantile Trust Co.*, 154 U. S., 413.)

Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act. (*Marshall, C. J.*, in *Sturges v. Crowninshield*, 4 Wheat., 122.)

In *Robb v. Connolly* (111 U. S., 637), Justice Harlan said:

Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in



pursuance thereof. Wherever those rights are involved in any suit or proceeding before them; for the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding." If they fail therein, and withhold or deny rights or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.

*In re Matthews* (122 Fed. Rep., 248, p. 251) :

The second clause of article 6 of the Federal Constitution is in these words:

"This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

A recent writer in the *American Law Review* has had this to say concerning this clause, to-wit:

"This provision presupposes that the judges in every State will have some knowledge of the Constitution, the laws, and the treaties of the Federal Government by which they are thus to be bound; and this community of interest and obligation obviously makes the judicial officers of the several States, in a certain high sense, members of the federal judiciary."

In the case of *Robb v. Connolly* (111 U. S., 637; 4 Sup. Ct., 551; 28 L. Ed., 542), Mr. Justice Harlan said:

"A state court of original jurisdiction, having the parties before it, may, consistently with existing federal legislation, determine cases at law or in equity arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws."

And again:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever these rights are involved in any suit or proceeding before them."

In the case of *Ex parte Royall*, *supra*, Mr. Justice Harlan said:

In *Taylor v. Carryl* (20 How., 595; 15 L. Ed., 1028) it was said to be a recognized portion of the duty of this court (and, we will add, of all other courts, national and state) "to give preference to such principles and methods or procedure as shall seem to conciliate the



distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system, coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and federal obligations." And in *Covell v. Heyman* (111 U. S., 182; 4 Sup. Ct., 358; 28 L. Ed., 390) it was declared "that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other, whereby conflicts are avoided by avoiding interference with the process of the other, is a principle of comity, with perhaps no higher sanction than the ability of which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity."

Pomeroy, "Introduction to the Constitutional Law of the United States," third edition, 503, Section 743:

Strip the National Government of an authority to apply a sanction commensurate with its power to legislate, and just so far we subtract from that legislation the necessary element of a command. Strip the Government of the ability to make that sanction supreme, and we equally invalidate the authority of the legislative utterance. This attribute of supremacy would be destroyed by permitting the state courts, for example, to decide upon the effect of national laws, and by making their decisions in the particular State where made of an equal authority with those pronounced upon the same subject by the national judges. This difficulty thus to be apprehended from the action of state tribunals could only be prevented in one of two ways—either by removing from them the power to decide at all upon rights and duties which spring from the national legislation and conferring the function exclusively upon the United States courts, or by permitting the state judiciary to exercise a jurisdiction in such cases, but making that jurisdiction subordinate to the authority of the national courts and rendering the local decisions reviewable by the United States judges, who could in this manner enforce their attribute of supremacy in relation to the matters under consideration.

In theory the former of these plans would have been the more simple and perfect. But it was perhaps best, from some motives of expediency, that the Constitution should not expressly determine between these two methods, but should clothe Congress with the power of making such a choice of the alternatives as should be found to promote the convenience of the people. Congress possesses such an authority; it might make all this jurisdiction exclusive in the national courts, but has done so only in particular cases; it might suffer the state tribunals to exercise a complete concurrent power, subject to an equally complete liability to review, but has done so only to a limited extent. Whether Congress shall adopt one or the other alternative is a mere question of policy; it may do either. \* \* \*

The Supreme Court of the United States, in *Teal v. Fulton* (53 U. S., 292), referring to this subject, said:

We will add that the legislation of Congress immediately after the Constitution was carried into operation confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act

of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and the United States was contemplated, for its first provision is for a review of cases adjudicated in the forum, "where is drawn in question the validity of a treaty or a statute of, or an authority exercised by, the United States, and the decision is against their validity."

The Supreme Court of the United States decided in this case of *Teal v. Fulton*, that a state court had jurisdiction to try an action brought against a postmaster who refused to deliver a newspaper on which there was "an initial" unless the addressee would pay letter postage, the action being founded on the thirteenth and thirtieth sections of the act of Congress passed in 1825 forbidding a writing or memorandum on a newspaper or other printed matter, pamphlet, or magazine transmitted by mail. The court said, Mr. Justice Wayne delivering the opinion:

But it is said that the courts of New York had not jurisdiction to try the case. The objection may be better answered by reference to the laws of the United States in respect to the services to be rendered in the transmission of letters and newspapers by mail and by the Constitution of the United States than it can by any general reasoning upon the concurrent civil jurisdiction of the courts of the United States and the courts of the States, or concerning the exclusive jurisdiction given by the Constitution to the former.

The United States undertakes, at fixed rates of postage, to convey letters and newspapers for those to whom they are directed, and the postage may be prepaid by the sender or be paid when either reach their destination by the person to whom they are addressed. When tendered by the latter or by his agent he has the right to the immediate possession of them, though he has not had before the actual possession. If they be wrongfully withheld for the charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court.

Now, the courts of New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States by the Constitution of the United States. That such is not the case, we can not express our view better than Mr. Justice Wright has done in his opinion in this case in the court of appeals. After citing the second section of the third article of the Constitution, he adds, "This is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary."

We will add that the legislation of Congress, immediately after the Constitution was carried into operation, confirms the conclusion of the learned judge. We find in the twenty-fifth section of the judiciary act of 1789, under which this case is before us, that such a concurrent jurisdiction in the courts of the States and of the United States was contemplated, for its first provision is for a review of cases adjudicated in the former; "Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity." We are satisfied that there was no error in the decision of the court of appeals in this case, and the same is affirmed by this court.

In the case of *The Moses Taylor* (1866, 4 Wall., U. S., 428) the court said:

\* \* \* The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the federal courts.

On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a federal or a state court, at the option of the plaintiff; and if brought in the state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the judiciary act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions can not be seriously questioned, and is of frequent recognition by both state and federal courts.

It is difficult to understand why the Connecticut court cites the case of *Claffin v. Houseman* (93 U. S., 130) as authority for the remarkable position taken, for a careful consideration of the opinion of Mr. Justice Bradley in that case shows conclusively that the opinion affords no basis for the contention made by the court that the state court is not author-

ized and required to enforce Federal statutes. In his opinion, Mr. Justice Bradley said:

The general question, whether state courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States has been elaborately discussed, both on the bench and in published treatises; sometimes with a leaning in one direction and sometimes in the other: but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the federal and state governments, there is really no just foundation for excluding the state courts from all such jurisdiction.

The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as state laws are.

The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State: concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts.

So rights, whether legal or equitable, acquired under the laws of the United States may be prosecuted in the United States courts or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction.

See remarks of Mr. Justice Field in *The Moses Taylor* (4 Wall., 429; 71 U. S., XVIII, 401), and Story, J., in *Martin v. Hunter* (1 Wheat., 334), and Mr. Justice Swayne in *Ex parte McNeil* (13 Wall., 236; 80 U. S., XX, 624).

This jurisdiction is sometimes exclusive by express enactment and sometimes by implication.

If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court.

The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.



The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

It is often the cause or the consequence of an unjustifiable jealousy of the United States Government which has been the occasion of disastrous evils to the country.

It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of *Ableman v. Booth* (21 How., 506; 62 U. S., XVI, 169), and hence state courts have no power to revise the action of the federal courts, nor the federal the state, except where the Federal Constitution or laws are involved. But this is no reason why state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied. \* \* \*

In *Ex parte Siebold* (100 U. S.) the court said:

The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and so far as it is exercised and no further the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the state and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself.

We can not yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.

There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded.

But in this case expressly, and in some others by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedence is eliminated.

The position assumed by the court on this question is without precedent and is entirely untenable in the light of the judicial history of the United States. If a Federal right can not be the basis of a plaintiff's claim in a state court; if those courts derive their power and authority and compensation from the States for the purpose of deciding only controversies arising under the law of the State, written and unwritten,



then a defense based upon a Federal right would be equally unenforceable in said courts. If they refuse to try Federal questions for a plaintiff, because they are without jurisdiction, how can they consent to try a Federal question when asserted as a ground of defense by the party proceeded against?

In a comparatively recent case the Supreme Court of the United States, in the case of the *Defiance Water Co. v. Defiance* (191 U. S., 194), Chief Justice Fuller, in delivering the opinion of the court, used the following language:

Moreover, the state courts are perfectly competent to decide federal questions arising before them and it is their duty to do so. (*Robb v. Connolly*, 111 U. S., 624, 637, 28 L. Ed., 542, 546, 4 Sup. Ct. Rep. 544; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S., 556, 583, 40 L. Ed., 336, 543, 16 Sup. Ct. Rep., 389.

And we repeat, the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require. (*Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S., 18, 27 L. ed., 636, 1 Sup. Ct. Rep., 614, 617; *Shreveport v. Cole*, 129 U. S., 36, 32 L. Ed., 589, 9 Sup. Ct. Rep., 210; *Neal v. Delaware*, 103 U. S., 370, 389, 26 L. Ed., 567, 571; *New Orleans v. Benjamin*, 153 U. S., 411, 424, 38 L. Ed., 764, 769, 14 Sup. Ct. Rep., 905.)

If error supervenes the remedy is found in paragraph 709 of the Revised Statutes. (U. S. Comp. Stat., 1901, p. 575.)

In *Clafin v. Houseman*, *ante*, the court said:

The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. \* \* \*

The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments.

It is often the cause or the consequence of an unjustifiable jealousy of the United States Government, which has been the occasion of disastrous evils to the country.

Mr. Justice Shiras, in commenting upon the concurrent jurisdictional power of the state and federal courts, in the case of *Murray v. Chicago and N. W. Ry. Co.* (62 Fed. Rep., 24), said:

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the State can not legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon

the legislative power of the nation and of the several States do not necessarily apply to the judicial branches of the national and state governments. The legislature of a State can not abrogate or modify any of the provisions of the Federal Constitution nor of the acts of Congress touching matters within congressional control, but the courts of the State, in the absence of a prohibitory provision in the Federal Constitution or acts of Congress, have full jurisdiction over cases arising under the Constitution and laws of the United States.

The courts of the States are constantly called upon to hear and decide cases arising under the Federal Constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the State when the adverse parties are citizens of different States. The duty of the court is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of the State can not abrogate or change it, but the courts of the State may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond legislative control does not, ipso facto, prevent the courts of the State from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, the court would have had jurisdiction to hear and determine the issues between the parties, because Congress had not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.

The discussion by Judge Baldwin of the right of a state court to refuse to enforce such a statute as the one in question and his reference to the "public policy" of a State as a ground for such a refusal to take jurisdiction indicate clearly that he had in mind the decisions as to the exercise of "comity" by the courts of one State in taking jurisdiction of foreign laws; that is, the laws of another State. There are many decisions upon the right of a party to enforce in one State the statutes of another.

If this was such a case, there is authority for the position taken in the *Hoxie* case. But the decision in these cases is justified on the ground that statutes of other States (foreign laws) have no extraterritorial force. Such decisions have no bearing when the question before a state court is the enforcement of a Federal law. This is not a mere question of comity; it is a question of authority.

The Federal law is imperative, mandatory, and paramount over every foot of the soil of every State. It is in no sense foreign when its application or enforcement is sought in the

courts of a State. No policy of a State can impair its imperative obligation. No official of a State, sworn to support the Constitution of the United States can deny the enforcement of a statute of the United States, made in pursuance of the United States Constitution. Such law by the Constitution is made "the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding."

How can a judge of a state court deny the imperative obligation of a Federal statute on any occasion in his court? Before he can lawfully assume the duties as such state judge he is bound by oath in obedience to the express requirements of the Constitution (Art. VI, sec. 3) to support the Constitution of the United States, which in express terms makes Federal statutes "the supreme law of the land," and the judges in every State shall be bound thereby, "anything in the Constitution or laws of any State to the contrary notwithstanding."

Federal laws are not dependent upon the judicial courtesy of state courts, to be enforceable in the courts of some States and to be refused enforcement in others. They are "the supreme law of the land, and the judges in every State shall be bound thereby."

#### SURVIVAL OF ACTION.

In considering the advisability of amending the act entitled "An act relating to the liability of common carriers by railroads to their employees in certain cases," approved April 22, 1908, it is important at the outset to understand that the purpose of Congress in the passage of this act was to extend further protection to employees. This was its manifest purpose, as is apparent from a consideration of the circumstances of its enactment. It is manifest from a consideration of the reports, both of the Senate and House committees, when the measure was pending before those bodies prior to its enactment, that the purpose of the statute was to extend and enlarge the remedy provided by law to employees engaged

in interstate commerce in cases of death or injury to such employees while engaged in such service. No purpose or intent on the part of Congress can be found to limit or to take away from such an employee any right theretofore existing by which such employees were entitled to a more extended remedy than that conferred upon them by the act.

The effect of decisions of cases so far adjudicated under the act has been in general to recognize the true intent of Congress and to extend and make more ample the right to recover damages for death or injury to interstate servants, yet in some particulars its operation has been to limit a recovery which otherwise would have been open to the employee or his representative.

One result of the passage of the law may be to nullify state laws affording a remedy in certain cases for death or injury in railroad service. The state laws which had been operative and which were valid even in their application to those engaged in service in interstate commerce appear to have been rendered, as to interstate servants, ineffective when Congress acted upon this subject. That this seems to have been the effect of the passage of this law was expressly decided in a well-considered opinion by Judge Rogers in the case of *Fulgam v. Midland Valley R. Co.* (167 Fed., 660, p. 662):

It is clear that the act of April 22, 1908, supra, superseded and took the place of all state statutes regulating relations of employers and employees engaged in interstate commerce by railroads. It covered not only injuries sustained by employees engaged in that commerce resulting from the negligence of the master and his servants, and from defects in the designated instrumentalities in use in that commerce, but also dealt with contributory and comparative negligence and assumed risk, making, in certain cases at least, the master an insurer of the safety of the servant while in his employment in that commerce. It covers and overlaps the whole state legislation, and is therefore exclusive.

All state legislation on that subject must give way before that act. (Miss. Railroad Commission v. Ill. Cent. R. R. Co., 203 U. S. 335; 27 Sup. Ct. 90; 51 L. Ed., 209; Sherlock et al. v. Alling, administrator, 93 U. S., 104; 23 L. Ed., 819.) These last cases serve to show that, until Congress has acted with reference to the regulation of interstate commerce, state statutes regulating the relations of master and servant and incidentally affecting interstate commerce, but not regulating or obstructing it, may be given effect; but when Congress has acted upon a given subject state legislation must yield.



In *Gulf, Colorado, etc., Railroad Co. v. Helley* (158 U. S., 99; 19 Sup. Ct., 804; 39 L. Ed., 910) the court said: "When a state statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerning it, the state statute must give way."

When Congress acted upon the subject of the regulation of the liability of interstate carriers for injuries to their servants engaged in interstate commerce, "the State was thereby precluded from enacting any law of that sort which would have that effect, for the field of policy and legislation was thus assumed by Congress and withdrawn from state competency." (*Wisconsin v. C. M. & St. P. Ry. Co.*, 117 N. W., 686.)

In the course of his opinion in the case above cited, Justice Dodge, delivering the unanimous opinion of the supreme court of Wisconsin, very clearly stated this doctrine and the authority upon which it was based, as follows:

Within the field of authorized congressional action the federal power must, in the nature of things, be supreme in all parts of the United States. "This Constitution, and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (Art. VI, par. 2, Const. U. S.) In *Cooley v. Board of Wardens* (12 How., 299, 318), it was said of this class of legislation: "It is not the mere existence of such power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional legislation." In *Pennsylvania v. Wheeling, etc., Co.* (18 How., 431), where a state law authorized the building of a bridge over a navigable water, it was declared that even in the matter of a bridge "if Congress chooses to act, its action necessarily precludes the action of the State."

In *United States v. Colorado & N. W. R.* (157 Fed. Rep., 321, 330), Sanborn, J., remarks:

"The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power can not be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary in order to regulate interstate commerce fully and effectually. \* \* \* That power is not subordinate but is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail and the latter must give way." (See also *Gibbons v. Ogden*, 9 Wheat., 1, 209, 210.)



It will be observed from these utterances that it is not a mere question of conflicting laws in the two jurisdictions, so that the law of a State will be valid so far as not antagonistic to a federal law. The question is more properly one of jurisdiction over the subject, the holding being that within the second class of subjects above outlined silence of Congress is deemed a relegation to the States of such jurisdiction and authority, but action by Congress upon the particular subject is deemed an assertion of the federal power, a declaration of the policy that the subject shall be under federal and not state regulation, and that, therefore, the power shall no longer rest in the State to exercise that authority which by the Constitution of the United States was surrendered to the Federal Government when and if Congress deemed its exercise advisable.

In a recent decision of the court of civil appeals, State of Texas, the court unanimously stated this doctrine as follows:

It is well settled that the power of Congress to regulate interstate commerce under the provisions of the Constitution before mentioned is plenary and includes the power to prescribe the qualifications, duties, and liabilities of employees of railway companies engaged in interstate commerce, and any legislation by Congress on such subject supersedes any state law upon the same subject. (*Railway Co. v. Alabama*, 128 U. S., 99; *Howard v. Railway Co.*, 207 U. S., 463.)

The constitutional right of Congress to legislate upon this subject having been exercised by that body, the right of the State to invade this field of legislation ceased, or, at all events, no act of a state legislature in conflict with the act of Congress upon the same subject can be held valid. The supreme courts of Missouri and Wisconsin, in passing upon the validity of statutes of said States similar to the act we are considering, hold such statutes void upon the ground of conflict with the act of Congress before mentioned. (*State v. Mo. Pac. Ry. Co.*, 111 S. W., 500; *State v. C. M. & St. P. Ry. Co.*, 117 N. W., 686.)

Judge Cooley, in his work on Constitutional Limitations, seventh edition, 856, said:

It is not doubted that Congress has the power to go beyond the general regulation of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable; and that to whatever extent ground shall be covered by these directions, the exercise of state power is excluded.

It is therefore undoubtedly the law that congressional action upon the liability of carriers engaged in interstate commerce, for injuries to their employees, supersedes all state legislation upon the same subject, and renders them, as long as the Federal law remains in operation, of no avail as providing a legal remedy.

Many of the States provide by statute for the survival of any action which the deceased may have had for the injury

to his estate, and for any expenditures during his lifetime resulting from the injury.

In the phraseology of the existing Employers' Liability Act—that is, the Act of April 22, 1908—the expression used is, as to the question now under consideration:

Shall be liable in damages \* \* \* in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, employees, \* \* \*."

In the case of *Fulgam v. Midland Valley R. R. Company*, hereinbefore cited, the court said:

In the opinion of the court, right of action given to the injured employee by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, at common law, perishes with the injured person.

In the case of *Walsh, admx., v. New York, New Haven and Hartford Railroad Company*, Circuit Judge Lowell, who delivered the opinion of the court, said in a case arising under the Employers' Liability Act of April 22, 1908, after quoting the case of *Fulgam v. Midland Valley R. R. Co.* (167 Fed., 660):

The defendant has further demurred to counts one and four, contending that the employee's cause of action to recover for his conscious suffering did not survive to his administratrix, although the existence of some of the statutory relatives was alleged. As the cause of action is given by a federal statute, this court can not have recourse to a state statute in order to determine whether the cause of action survives or not. (*Schreiber v. Sharpless*, 110 U. S., 76, 80; *B. & O. R. R. v. Joy*, 173 U. S., 226, 230; *U. S. v. DeGoer*, 38 Fed., 80; *U. S. v. Riley*, 104 Fed., 275.) Revised Statutes, section 955, provides that "When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." This section does not itself provide what causes of action shall survive, but in the absence of other controlling statute leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable. There is no general federal statute, and the particular statute in question, the act of 1908, says nothing about survival.

Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive and so that counts one and four are demurrable. (*Fulgam v. Midland*

Valley Co., 167 Fed., 660.) The court is justified in saying that this result has been reached with reluctance. The maxim "*Actio personalis moritur cum persona*" has not always commended itself. (Pollock on Torts, Webb's ed., p. 71.) The survival of the cause of action in this case is allowed by the statutes of many States. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrongdoer, should, as to his own estate, be deprived of this remedy by the delays of the law, or without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems to me, as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the legislature has established the rule in this case.

The language of the statute should be made clear so that the uncertainty and obscurity suggested by Judge Lowell would be removed. So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear.

It certainly should be as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject.

## APPENDIX C.

### ENGLISH EMPLOYERS' LIABILITY ACT.

The English Employers' Liability Act of 1880<sup>1</sup> provides: "Where \* \* \* personal injury is caused to a workman (1) By reason of any defect in the condition of the ways, work, machinery or plant connected with or used in the business of the employer; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having to conform; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." "A workman shall not be entitled under this act to any right

<sup>1</sup> 43 and 44 Vict. 42.

of compensation or remedy against the employer in any of the following cases; that is to say: (1) Under sub-section one of Section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; (2) Under sub-section four of Section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided, that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade, or any other department of the government, under or by virtue of any act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law; (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

### ENGLISH ACT CONSTRUED.

In *Roberts' Duty and Liability of Employers* it is said of this act: "It does not altogether abolish the defense of common employment.<sup>2</sup> It does not make the employer responsible for the acts of persons who either are not his servants, or are not acting within the scope of their employment as such. It does not make him responsible for acts or omissions which do not constitute a breach of duty.<sup>3</sup> It

<sup>2</sup>Citing *Gibbs v. Great Western R. Co.* 12 Q. B. Div. 211; *Robins v. Collet*, 146 L. T. 535.

<sup>3</sup>Citing *Grant v. Drysdale*, 10

R. p. 1161; *Hamilton v. Hyde Park Foundry* 22 Sc. L. R. 709; *Walsh v. Whitely*, 21 Q. B. Div. 371.



does not create a new cause of action where none was in existence previously;<sup>4</sup> but only adds a remedy against a person other than the wrongdoer, or, in other words, directs an old cause of action against a new defendant. It does not give an absolute right of action, but merely removes one defense,<sup>5</sup> placing the workman even when all the conditions have been satisfied, only in the position of one of the public.<sup>6</sup> From which it follows that it does not make the employer responsible where the workman has been guilty of contributory negligence;<sup>7</sup> or has, within the meaning of the maxim, *volenti non fit injuria*, voluntarily undertaken the consequences of that which but for his acceptance of the risk would have constituted a breach of duty on the part of the employer.<sup>8</sup> It does not impose any liability on the employer in favor of either the representatives or the relatives of an injured workman, unless the workman's death results from the injury. And lastly, it does not, as we have seen, deprive the workman of any right of action against the employer which is given him by the common law."<sup>9</sup>

<sup>4</sup>Citing *Thomas v. Quartermain*, 18 Q. B. Div., pp. 692, 693; *Morrison v. Baird*, 10 R., p. 277; *Robertson v. Russell*, 12 R., p. 638.

<sup>5</sup>Citing *Yarmouth v. France*, 19 Q. B. Div., p. 659; *Morrison v. Baird*, 10 R., pp. 277, 278 (S. C.)

<sup>6</sup>Citing *Thomas v. Quartermain*, 18 Q. B. Div., p. 693; *Stuart v. Evans*, 31 W. R. 706.

<sup>7</sup>Citing *Thomas v. Quartermain*, at p. 698.

<sup>8</sup>Citing *Yarmouth v. France*, 19 Q. B. Div., 659.

<sup>9</sup>*Roberts Employers' Liability Act*, p. 248.

<sup>1</sup>NOTE.—similar statutes have been held constitutional. *Holden v. Hardy*, 169 U. S. 366; 18 Sup. Ct. Rep. 383. But see *Ritchie v. People*, 155 Ill. 98; 40 N. E. Rep. 454; 29 L. R. A. 79; and *Low v. Rees Printing Co.* 41 Neb. 127; 59 Pac. Rep. 362; 24 L. R. A. 702.

## APPENDIX D.

### SAFETY APPLIANCE ACTS.

AN ACT to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive-engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

NOTE.—A comma should be inserted after the word "uncoupled" in Section 2. *Johnson v. Southern Pacific Co.*, 196 U. S., 1; 25 Sup. Ct., 158; 49 L. Ed., 363, reversing 117 Fed., 462; 54 C. C. A., 508; *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed., 522; see *United States v. Erie R. Co.*, 166 Fed., 352.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of Section one of this act, it may lawfully refuse to receive from connecting lines of road or shipper any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars measured perpendicular from the level of the tops of the rails to the centers of the draw bars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the draw bars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate

traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge, *Provided*, That nothing in this act contained shall apply to trains composed of four-wheeled cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended April 1, 1896, 29 U. S. Stat. at L., 85, ch. 87.)

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employe of any such carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Approved, March 2, 1893, 27 U. S. Stat. at Large, 531, ch. 196.

NOTE.—As to jurisdiction of the Circuit Court of the District of Columbia, see *United States v. Baltimore & O. R. Co.*, 26 App. D. C., 851.

AN ACT to amend an act entitled, "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six. (Public No. 133, approved March 2, 1903.)

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled*, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train



is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

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### LADDERS, HAND BRAKES, HAND HOLDS.

[PUBLIC No. 133.]

[H. R. 5702.]

AN ACT to supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and

for other purposes," and other safety appliance Acts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."*

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with

any such requirement of the Interstate Commerce Commission, to be made after full hearing, and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act

or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

SEC. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and



all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this Act.

Approved, April 14, 1910.

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ORDER OF THE INTERSTATE COMMERCE COM-  
MISSION JUNE 6, 1910.

IN THE MATTER OF THE STANDARD HEIGHT OF  
THE MINIMUM PERCENTAGE OF POWER  
BRAKES.

The Commission having under consideration the question of requiring an increase in the minimum percentage of power brakes to be used and operated on trains and railroads engaged in interstate commerce, as provided by section two of the Act of March 2, 1903, and it appearing to the Commission, after full hearing had on May 5, 1909, due notice of which was given all common carriers, owners and lessees engaged in interstate commerce by railroad in the United States, and at which time all interested parties were given an opportunity to be heard and submit their views, that to secure more fully the objects of the Act to promote the safety of employees and travelers on railroads, the minimum percentage of power-brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased.

*It is ordered*, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85% of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85% shall have their brakes so used and operated.



ORDER OF THE INTERSTATE COMMERCE COMMISSION,  
OCTOBER 10, 1910.

IN THE MATTER OF THE STANDARD HEIGHT OF  
DRAWBARS.

WHEREAS, By the third section of an Act of Congress approved April 14, 1910, entitled "An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars, and to fix the time within which such modification or change shall become effective and obligatory; and

WHEREAS, A hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910;

NOW, THEREFORE, In pursuance of and in accordance with the provisions of said Section 3 of said Act.

*It is ordered*, That (except on cars specified in the proviso in Section 6 of the Safety Appliance Act of March 2, 1893, as the same was amended April 1, 1896), the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to-wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said Act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches, and on narrow-gauge railroads in the United States subject to said Act the maximum height

of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said Act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be  $17\frac{1}{2}$  inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be  $14\frac{1}{2}$  inches.

*And it is further ordered,* That such modification or change shall become effective and obligatory December 31, 1910.

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AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 13TH DAY OF MARCH, A. D., 1911.

*Present:*

JUDSON C. CLEMENTS,  
CHARLES A. PROUTY,  
FRANKLIN K. LANE,  
EDGAR E. CLARK,  
JAMES S. HARLAN,  
CHARLES C. MCCORD,  
BALTHASAR H. MEYER,

Commissioners.

IN THE MATTER OF DESIGNATING THE NUMBER,  
DIMENSIONS, LOCATION, AND MANNER OF APPLI-  
CATION OF CERTAIN SAFETY APPLIANCES.

Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel

brakes, and for other purposes,' and other safety appliance acts, and for other purposes," it is provided, among other things, "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by Section two of this act and Section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of passage of this act;" and

Whereas hearings in the matter of the number, dimensions, location, and manner of application of the appliances, as provided in said section of said act, were held before the Interstate Commerce Commission at its office in Washington, D. C., on September 29th and 30th and October 7th, 1910, respectively; and February 27th, 1911;

Now, therefore, in pursuance of and in accordance with the provisions of said Section three of said act, and superseding the Commission's order of October 13, 1910, relative thereto

*It is ordered*, That the number, dimensions, location, and manner of application of the appliances provided for by Section two of the Act of April 14, 1910, and Section four of the Act of March 2, 1893, shall be as follows:

## BOX AND OTHER HOUSE CARS.

## HAND-BRAKES.

NUMBER: Each box or other house car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

DIMENSIONS: The brake-shaft shall be not less than one and one-fourth ( $1\frac{1}{4}$ ) inches in diameter, of wrought iron or steel without weld.

The brake-wheel may be flat or dished, not less than fifteen (15), preferably sixteen (16) inches in diameter, of malleable iron, wrought iron or steel.

LOCATION: The hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

MANNER OF APPLICATION: There shall be not less than four (4) inches clearance around rim of brake-wheel.

Outside edge of brake-wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

Top brake-shaft support shall be fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets. (See Plate A.)

A brake-shaft step shall support the lower end of brake-shaft. A brake-shaft step which will permit the brake-chain to drop under the brake-shaft shall not be used. U-shaped form of brake-shaft step is preferred. (See Plate A.)

Brake-shaft shall be arranged with a square fit at its upper end to secure the hand-brake wheel; said square fit shall be not less than seven-eighths ( $\frac{7}{8}$ ) of an inch square. Square-fit taper; nominally two (2) in twelve (12) inches. (See Plate A.)

Brake-chain shall be of not less than three-eighths ( $\frac{3}{8}$ ), preferably seven-sixteenths (7-16) inch wrought iron or steel, with a link on the brake-rod end of not less than seven-sixteenths (7-16), preferably one-half ( $\frac{1}{2}$ ) inch wrought iron or steel, and shall be secured to brake-shaft drum by not less than one-half ( $\frac{1}{2}$ ) inch hexagon or square-headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.)

Lower end of brake-shaft shall be provided with a trunnion of not less than three-fourths ( $\frac{3}{4}$ ), preferably one (1) inch in diameter extending through brake-shaft step and held in operating position by a suitable cotter or ring. (See Plate A.)

Brake-shaft drum shall be not less than one and one-half ( $1\frac{1}{2}$ ) inches in diameter. (See Plate A.)

Brake ratchet-wheel shall be secured to brake-shaft by a key or square fit; said square fit shall be not less than one and five-sixteenths (1 5-16) inches square. When ratchet-wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake-pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ( $5\frac{1}{4}$ ), preferably five and one-half ( $5\frac{1}{2}$ ) inches in diameter and shall have not less than fourteen (14), preferably sixteen (16) teeth. (See Plate A.)

If brake ratchet-wheel is more than thirty-six (36) inches from brake-wheel, a brake-shaft support shall be provided to support this extended upper portion of brake-shaft; said brake-shaft support shall be fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

The brake-pawl shall be pivoted upon a bolt or rivet not less than five-eighths ( $\frac{5}{8}$ ) of an inch in diameter, or upon a trunnion secured by not less than one-half ( $\frac{1}{2}$ ) inch bolt or rivet, and there shall be a rigid metal connection between brake-shaft and pivot of pawl.

Brake-wheel shall be held in position on brake-shaft by a nut on a threaded extended end of brake-shaft; said threaded portion shall be not less than three-fourths ( $\frac{3}{4}$ ) of an inch in



diameter; said nut shall be secured by riveting over or by the use of a lock-nut or suitable cotter.

Brake-wheel shall be arranged with a square fit for brake-shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches. (See Plate A.)

#### BRAKE-STEP.

If brake-step is used, it shall be not less than twenty-eight (28) inches in length. Outside edge shall be not less than eight (8) inches from face of car and not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill.

MANNER OF APPLICATION: Brake-step shall be supported by not less than two metal braces having a minimum cross-sectional area three-eighths ( $\frac{3}{8}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, which shall be securely fastened to body of car with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### RUNNING-BOARDS.

NUMBER: One (1) longitudinal running-board.

On outside-metal-roof cars two (2) latitudinal extensions.

DIMENSIONS: Longitudinal running-board shall be not less than eighteen (18), preferably twenty (20) inches in width.

Latitudinal extensions shall be not less than twenty-four (24) inches in width.

LOCATION: Full length of car, center of roof.

On outside-metal-roof cars there shall be two (2) latitudinal extensions from longitudinal running-board to ladder locations, except on refrigerator cars where such latitudinal extensions can not be applied on account of ice hatches.

MANNER OF APPLICATION: Running-boards shall be continuous from end to end and not cut or hinged at any point: *Provided*, That the length and width of running-boards may be made up of a number of pieces securely fastened to saddle-blocks with screws or bolts.

The ends of longitudinal running-board shall be not less than six (6) nor more than ten (10) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill; and if more than four (4) inches from edge of roof of car, shall be securely supported their full width by substantial metal braces.

Running-boards shall be made of wood and securely fastened to car.

#### SILL-STEPS.

NUMBER: Four (4).

DIMENSIONS: Minimum cross-sectional area one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches, or equivalent, of wrought iron or steel.

Minimum length of tread, ten (10), preferably twelve (12) inches.

Minimum clear depth, eight (8) inches.

LOCATION: One (1) near each end on each side of car, so that there shall be not more than eighteen (18) inches from end of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22) inches above the top of rail.

MANNER OF APPLICATION: Sill-steps exceeding twenty-one (21) inches in depth shall have an additional tread.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### LADDERS.

NUMBER: Four (4).

DIMENSIONS: Minimum clear length of tread: Side ladders sixteen (16) inches; end ladders fourteen (14) inches.

Maximum spacing between ladder-treads, nineteen (19) inches.

Top ladder-tread shall be located not less than twelve (12) nor more than eighteen (18) inches from roof at eaves.

Spacing of side ladder treads shall be uniform within a limit of two (2) inches from top ladder tread to bottom tread of ladder.

Maximum distance from bottom tread of side ladder to top tread of sill-step, twenty-one (21) inches.

End ladder treads shall be spaced to coincide with treads of side ladders, a variation of two (2) inches being allowed. Where construction of car will not permit the application of a tread of end ladder to coincide with bottom tread of side ladder, the bottom tread of end ladder must coincide with second tread from bottom of side ladder.

Hard-wood treads, minimum dimensions one and one-half ( $1\frac{1}{2}$ ) by two (2) inches.

Iron or steel treads, minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch.

Minimum clearance of treads, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) on each side, not more than eight (8) inches from right end of car; one (1) on each end, not more than eight (8) inches from left side of car; measured from inside edge of ladder-stile or clearance of ladder treads to corner of car.

MANNER OF APPLICATION: Metal ladders without stiles near corners of cars shall have foot guards or upward projections not less than two (2) inches in height near inside end of bottom treads.

Stiles of ladders, projecting two (2) or more inches from face of car, will serve as foot-guards.

Ladders shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets. Three-eighths ( $\frac{3}{8}$ ) inch bolts may be used for wooden treads which are gained into stiles.

## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## SIDE-HANDHOLDS.

NUMBER: One (1) over each ladder.

One (1) right angle handhold may take the place of two (2) adjacent specified roof-handholds, provided the dimensions and locations coincide, and that an extra leg is securely fastened to car at point of angle.

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: On roof of car: One (1) parallel to treads of each ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof, *except* on refrigerator cars where ice hatches prevent, when location may be nearer edge of roof.

MANNER OF APPLICATION: Roof-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HAND-HOLDS.

NUMBER: Four (4).

[*Tread of side-ladder is a side-handhold.*]

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Horizontal: One (1) near each end on each side of car.

Side-handholds shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, where tread of ladder is a handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### HORIZONTAL END-HANDHOLDS.

NUMBER: Eight (8) or more. [Four (4) on each end of car.]

*[Tread of end-ladder is an end-handhold.]*

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches, preferably twenty-four (24) inches.

A handhold fourteen (14) inches in length may be used where it is impossible to use one sixteen (16) inches in length.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) near each side on each end of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, *except* as provided above, when tread of end-ladder is an end-handhold. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill or sheathing over end-sill, projecting outward or downward.



Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

One each end of cars with platform end-sills six (6) or more inches in width, measured from end-post or siding and extending entirely across end of car, there shall be one additional end-handhold not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

MANNER OF APPLICATION: Horizontal end-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### VERTICAL END-HANDHOLDS.

NUMBER: Two (2) on full-width platform end-sill cars, as heretofore described.

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, eighteen (18), preferably twenty-four (24) inches.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) on each end of car opposite ladder, not more than eight (8) inches from side of car; clearance of bottom end of handhold shall be not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

MANNER OF APPLICATION: Vertical end-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### UNCOUPLING-LEVERS.

NUMBER: Two (2).

Uncoupling-levers may be either single or double, and of any efficient design.

**DIMENSIONS:** Handles of uncoupling-levers, *except* those shown on Plate B or of similar designs, shall be not more than six (6) inches from sides of car.

Uncoupling-levers of design shown on Plate B and of similar designs shall conform to the following-prescribed limits:

Handles shall be not more than twelve (12), preferably nine (9) inches from sides of cars. Center lift-arms shall be not less than seven (7) inches long.

Center of eye at end of center lift-arm shall be not more than three and one-half ( $3\frac{1}{2}$ ) inches beyond center of eye of uncoupling-pin of coupler when horn of coupler is against the buffer-block or end-sill. (See Plate B.)

Ends of handles shall extend not less than four (4) inches below bottom of end-sill or shall be so constructed as to give a minimum clearance of two (2) inches around handle. Minimum drop of handles shall be twelve (12) inches; maximum, fifteen (15) inches over all. (See Plate B.)

Handles of uncoupling-levers of the "rocking" or "push-down" type shall be not less than eighteen (18) inches from top of rail when lock-block has released knuckle, and a suitable stop shall be provided to prevent inside arm from flying up in case of breakage.

**LOCATION:** One (1) on each end of car.

When single lever is used it shall be placed on left side of end of car.

## HOPPER CARS AND HIGH-SIDE GONDOLAS WITH FIXED ENDS.

*[Cars with sides more than thirty-six (36) inches above the floor are high-side cars.]*

### HAND-BRAKES.

**NUMBER:** Same as specified for "Box and other house cars."

**DIMENSIONS:** Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of, and not more than twenty-two (22) inches from, center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### BRAKE-STEP.

Same as specified for "Box and other house cars."

#### SILL-STEPS.

Same as specified for "Box and other house cars."

#### LADDERS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars," *except* that top-ladder tread shall be located not more than four (4) inches from top of car.

LOCATION: Same as specified for "Box and other house cars."

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### SIDE-HANDHOLDS.

Same as specified for "Box and other house cars."

#### HORIZONTAL END-HANDHOLDS.

Same as specified for "Box and other house cars."

#### VERTICAL END-HANDHOLDS.

Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-

wheel, brake-step or uncoupling lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## DROP-END HIGH-SIDE GONDOLA CARS.

### HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

### SILL-STEPS.

Same as specified for "Box and other house cars."

### LADDERS.

NUMBER: Two (2).

DIMENSIONS: Same as specified for "Box and other house cars," *except* that top-ladder tread shall be located not more than four (4) inches from top of car.

LOCATION: One (1) on each side, not more than eight (8) inches from right end of car, measured from inside edge of ladder-stile or clearance of ladder-treads to corner of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

### SIDE-HANDHOLDS.

Same as specified for "Box and other house cars."

## HORIZONTAL END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## FIXED-END LOW-SIDE GONDOLA AND LOW-SIDE HOPPER CARS.

[Cars with sides thirty-six (36) inches or less above the floor are low-side cars.]

## HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.



The brake-shaft shall be located on end of car, to the left of and not more than twenty-two (22) inches from center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### BRAKE-STEP.

Same as specified for "Box and other house cars."

#### SILL-STEPS.

Same as specified for "Box and other house cars."

#### SIDE-HANDHOLDS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### HORIZONTAL END-HANDHOLDS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each side on each end of car not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit. Clearance of outer end of handhold shall be not more than eight (8) inches from side of car.

One (1) near each side of each end of car on face of end-sill, projecting outward or downward. Clearance of outer end of

handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-step, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### DROP-END LOW-SIDE GONDOLA CARS.

##### HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars," provided that top brake-shaft support may be omitted.

##### SILL-STEPS.

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler, if car construction will permit, but handhold shall not project above top of side. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## FLAT CARS.

*[Cars with sides twelve (12) inches or less above the floor may be equipped the same as flat cars.]*

## HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on the end of car to the left of center, or on side of car not more than thirty-six (36) inches from right-hand end thereof.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SILL-STEPS.

Same as specified for "Box and other house cars."

## SIDE-HANDHOLDS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

### TANK CARS WITH SIDE-PLATFORMS.

#### HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### SILL STEPS.

Same as specified for "Box and other house cars."

#### SIDE-HANDHOLDS.

NUMBER: Four (4) or more.

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) on face of each side-sill near each end. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank bands, four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank band.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."



## END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## TANK-HEAD HANDHOLDS.

NUMBER: Two (2). [*Not required if safety-railing runs around ends of tank.*]

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel. Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

LOCATION: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform.

MANNER OF APPLICATION: Tank-head handholds shall be securely fastened.

## SAFETY-RAILINGS.

NUMBER: One (1) continuous safety-railing running around sides and ends of tank, securely fastened to tank or tank bands at ends and sides of tank; or two (2) running full length of tank at sides of car supported by posts.

DIMENSIONS: Not less than three-fourths ( $\frac{3}{4}$ ) of an inch, iron.

LOCATION: Running full length of tank either at side supported by posts or securely fastened to tank or tank bands, not less than thirty (30) nor more than sixty (60) inches above platform.

MANNER OF APPLICATION: Safety-railings shall be securely fastened to tank body, tank bands or posts.

## UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

## END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## TANK CARS WITHOUT SIDE-SILLS AND TANK CARS WITH SHORT SIDE-SILLS AND END-PLATFORMS.

## HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## RUNNING-BOARDS.

NUMBER: One (1) continuous running-board around sides and ends; or two (2) running full length of tank, one (1) on each side.

DIMENSIONS: Minimum width on sides, ten (10) inches.

Minimum width on ends, six (6) inches.

**LOCATION:** Continuous around sides and ends of cars. On tank cars having end platforms extending to bolsters, running-boards shall extend from center to center of bolsters, one (1) on each side.

**MANNER OF APPLICATION:** If side running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

The running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank handhold.

#### SILL-STEPS.

**NUMBER:** Same as specified for "Box and other house cars."

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** One (1) near each end on each side under side-handhold.

Outside edge of tread of step shall be not more than four (4) inches inside of face of side of car, preferably flush with side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22) inches above the top of rail.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

#### LADDERS.

*[If running-boards are so located as to make ladders necessary.]*

**NUMBER:** Two (2) on cars with continuous running-boards.

Four (4) on cars with side running-boards.

**DIMENSIONS:** Minimum clear length of tread, ten (10) inches.

Maximum spacing of treads, nineteen (19) inches.

Hard-wood treads, minimum dimensions, one and one-half ( $1\frac{1}{2}$ ) by two (2) inches.

Wrought iron or steel treads, minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: On cars with continuous running-boards, one (1) at right end of each side.

On cars with side running-boards, one (1) at each end of each running-board.

MANNER OF APPLICATION: Ladders shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### SIDE-HANDHOLDS.

NUMBER: Four (4) or more.

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) on face of each side-sill near each end on tank cars with short side-sills, or one (1) attached to top of running-board projecting outward above sill-steps or ladders on tank cars without side-sills. Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If side safety-railings are attached to tank or tank bands four (4) additional vertical handholds shall be applied, one (1) as nearly as possible over each sill-step and securely fastened to tank or tank band.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side of each end of car on face of end-sill. Clearance of outer end of hand-

hold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### TANK-HEAD HANDHOLDS.

NUMBER: Two (2). [*Not required if safety-railing runs around ends of tank.*]

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Horizontal: One (1) across each head of tank not less than thirty (30) nor more than sixty (60) inches above platform on running-board. Clear length of handholds shall extend to within six (6) inches of outer diameter of tank at point of application.

MANNER OF APPLICATION: Tank-head handholds shall be securely fastened.

#### SAFETY-RAILINGS.

NUMBER: One (1) running around sides and ends of tank or two (2) running full length of tank.

DIMENSIONS: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Running full length of tank, not less than thirty (30) nor more than sixty (60) inches above platform or running-board.

MANNER OF APPLICATION: Safety-railings shall be securely fastened to tank or tank-bands and secured against end shifting.

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-shaft



brackets, brake-wheel, running-boards or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same, above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

## TANK CARS WITHOUT END-SILLS.

### HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion. The brake-shaft shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

### BRAKE-STEP.

Same as specified for "Box and other house cars."

### RUNNING-BOARDS.

NUMBER: One (1).

DIMENSIONS: Minimum width on sides, ten (10) inches. Minimum width on ends, six (6) inches.

LOCATION: Continuous around sides and ends of tank.

MANNER OF APPLICATION: If running-boards are applied below center of tank, outside edge of running-boards shall extend not less than seven (7) inches beyond bulge of tank.

Running-boards at ends of car shall be not less than six (6) inches from a point vertically above the inside face of knuckle when closed with coupler-horn against the buffer-block, end-sill or back-stop.

Running-boards shall be securely fastened to tank or tank bands.

## SILL-STEPS.

NUMBER: Four (4). [*If tank has high running-boards, making ladders necessary, sill-steps must meet ladder requirements.*]

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) near each end on each side, flush with outside edge of running-board as near end of car as practicable.

Tread not more than twenty-four (24), preferably not more than twenty-two (22) inches above the top of rail.

MANNER OF APPLICATION: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over; or with one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HANDHOLDS.

NUMBER: Four (4) or more.

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each end on each side of car over sill-step, on running-board, not more than two (2) inches back from outside edge of running-board, projecting downward or outward.

Where such side-handholds are more than eighteen (18) inches from end of car, an additional handhold must be placed near each end on each side not more than thirty (30) inches above center line of coupler.

Clearance of outer end of handhold shall be not more than twelve (12) inches from end of car.

If safety-railings are on tank, four (4) additional vertical handholds shall be applied, one (1) over each sill-step on tank.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side on each end of car on running-board, not more than two (2) inches back from edge of running-board projecting downward or outward, or on end of tank not more than thirty (30) inches above center line of coupler.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SAFETY-RAILINGS.

NUMBER: One (1).

DIMENSIONS: Minimum diameter seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Safety-railings shall be continuous around sides and ends of car, not less than thirty (30) nor more than sixty (60) inches above running-board.

MANNER OF APPLICATION: Safety-railings shall be securely fastened to tank or tank bands, and secured against end shifting.

## UNCOUPLING-LEVERS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars," *except* that minimum length of uncoupling-lever shall be forty-two (42) inches, measured from center line of end of car to handle of lever.

LOCATION: Same as specified for "Box and other house cars," *except* that uncoupling-lever shall be not more than thirty (30) inches above center line of coupler.

## END-LADDER CLEARANCE.

No part of car above buffer-block within thirty (30) inches from side of car, *except* brake-shaft, brake-shaft

brackets, brake-wheel or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or back-stop, and no other part of end of car or fixtures on same, above buffer-block, other than exceptions herein noted, shall extend beyond the face of buffer-block.

## CABOOSE CARS WITH PLATFORMS.

### HAND-BRAKES.

**NUMBER:** Each caboose car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

The hand-brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars with platforms shall be located on platform to the left of center.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

### RUNNING-BOARDS.

**NUMBER:** One (1) longitudinal running-board.

**DIMENSIONS:** Same as specified for "Box and other house cars."

**LOCATION:** Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

**MANNER OF APPLICATION:** Same as specified for "Box and other house cars."

## LADDERS.

NUMBER: Two (2).

DIMENSIONS: None specified.

LOCATION: One (1) on each end.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## ROOF-HANDHOLDS.

NUMBER: One (1) over each ladder.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: On roof of caboose, in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## CUPOLA-HANDHOLDS.

NUMBER: One (1) or more.

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) continuous handhold extending around top of cupola not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

MANNER OF APPLICATION: Cupola-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside and riveted over or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.



## SIDE-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, thirty-six (36) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) near each end on each side of car, curving downward toward center of car from a point not less than thirty (30) inches above platform to a point not more than eight (8) inches from bottom of car. Top end of handhold shall be not more than eight (8) inches from outside face of end-sheathing.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each side on each end of car on face of platform end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of platform end-sill.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## END-PLATFORM HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) right-angle handhold on each side of each end extending horizontally from door-post to corner of car at approximate height of platform-rail, then downward to within twelve (12) inches of bottom of car.

MANNER OF APPLICATION: Handholds shall be securely fastened with bolts, screws or rivets.

#### CABOOSE PLATFORM-STEPS.

Safe and suitable box steps leading to caboose platforms shall be provided at each corner of caboose.

Lower tread of step shall be not more than twenty-four (24) inches above top of rail.

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

### CABOOSE CARS WITHOUT PLATFORMS.

#### HAND-BRAKES.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

The brake-shaft on caboose cars without platforms shall be located on end of car to the left of center.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### BRAKE-STEP.

Same as specified for "Box and other house cars."

#### RUNNING-BOARDS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Full length of car, center of roof. [*On caboose cars with cupolas, longitudinal running-boards shall extend from cupola to ends of roof.*]

Outside-metal-roof cars shall have latitudinal extensions leading to ladder locations.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### SILL-STEPS.

Same as specified for "Box and other house cars."

#### SIDE-DOOR STEPS.

NUMBER: Two (2) [*if caboose has side-doors*].

DIMENSIONS: Minimum length, five (5) feet.

Minimum width, six (6) inches.

Minimum thickness of tread, one and one-half ( $1\frac{1}{2}$ ) inches.

Minimum height of back-stop, three (3) inches.

Minimum height from top of rail to top of tread, twenty-four (24) inches.

LOCATION: One (1) under each side-door.

MANNER OF APPLICATION: Side-door steps shall be supported by two (2) iron brackets having a minimum cross-sectional area seven-eighths ( $\frac{7}{8}$ ) by three (3) inches or equivalent, each of which shall be securely fastened to car by not less than two (2) three-fourth ( $\frac{3}{4}$ ) inch bolts.

#### LADDERS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Same as specified for "Box and other house cars" *except* when caboose has side doors, then side-ladders shall be located not more than eight (8) inches from doors.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### END-LADDER CLEARANCE.

No part of car above end-sills within thirty (30) inches from side of car, *except* buffer-block, brake-shaft, brake-wheel, brake-step, running-board or uncoupling-lever shall extend to within twelve (12) inches of a vertical plane

parallel with end of car and passing through the inside face of knuckle when closed with coupler-horn against the buffer-block or end-sill, and no other part of end of car or fixtures on same above end-sills, other than exceptions herein noted, shall extend beyond the outer face of buffer-block.

#### ROOF-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: One (1) over each ladder, on roof in line with and running parallel to treads of ladder, not less than eight (8) nor more than fifteen (15) inches from edge of roof.

Where stiles of ladders extend twelve (12) inches or more above roof, no other roof-handholds are required.

MANNER OF APPLICATION: Roof-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### CUPOLA-HANDHOLDS.

NUMBER: One (1) or more.

DIMENSIONS: Minimum diameter five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) continuous cupola-handhold extending around top of cupola, not more than three (3) inches from edge of cupola-roof.

Four (4) right-angle handholds, one (1) at each corner, not less than sixteen (16) inches in clear length from point of angle, may take the place of the one (1) continuous handhold specified, if locations coincide.

MANNER OF APPLICATION: Cupola-handhold shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside and riveted over or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## SIDE-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Same as specified for "Box and other house cars."

LOCATION: Horizontal: One (1) near each end on each side of car, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler. Clearance of outer end of handhold shall be not more than eight (8) inches from end of car.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

## SIDE-DOOR HANDHOLDS.

NUMBER: Four (4): Two (2) curved, two (2) straight.

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) curved handhold, from a point at side of each door opposite ladder, not less than thirty-six (36) inches above bottom of car, curving away from door downward to a point not more than six (6) inches above bottom of car.

One (1) vertical handhold at ladder side of each door from a point not less than thirty-six (36) inches above bottom of car to a point not more than six (6) inches above level of bottom of door.

MANNER OF APPLICATION: Side-door handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

## HORIZONTAL END-HANDHOLDS.

NUMBER: Same as specified for "Box and other house cars."

DIMENSIONS: Same as specified for "Box and other house cars."



LOCATION: Same as specified for "Box and other house cars," *except* that one (1) additional end-handhold shall be on each end of cars with platform end-sills as heretofore described, unless car has door in center of end. Said handhold shall be not less than twenty-four (24) inches in length, located near center of car, not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

MANNER OF APPLICATION: Same as specified for "Box and other house cars."

#### VERTICAL END-HANDHOLDS.

Same as specified for "Box and other house cars."

#### UNCOUPLING-LEVERS.

Same as specified for "Box and other house cars."

### PASSENGER-TRAIN CARS WITH WIDE VESTIBULES.

#### HAND-BRAKES.

NUMBER: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

#### SIDE-HANDHOLDS.

NUMBER: Eight (8).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, metal.

Minimum clear length, sixteen (16) inches.

Minimum clearance, one and one-fourth ( $1\frac{1}{4}$ ), preferably one and one-half ( $1\frac{1}{2}$ ) inches.

LOCATION: Vertical: One (1) on each vestibule door-post.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with bolts, rivets or screws.

## END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

Handholds shall be flush with or project not more than one (1) inch beyond vestibule face.

LOCATION: Horizontal: One near each side on each end projecting downward from face of vestibule end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps and handholds shall be provided for men to reach such sockets or brackets.

## UNCOUPLING-LEVERS.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling-attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

## PASSENGER-TRAIN CARS WITH OPEN END-PLATFORMS.

## HAND-BRAKES.

NUMBER: Each passenger-train car shall be equipped with an efficient hand-brake, which shall operate in harmony with the power-brake thereon.

LOCATION: Each hand-brake shall be so located that it can be safely operated while car is in motion.

#### END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ), inches.

Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

LOCATION: Horizontal: One (1) near each side of each end on face of platform end-sill, projecting downward. Clearance of outer end of handhold shall be not more than sixteen (16) inches from end of end-sill.

MANNER OF APPLICATION: End-handholds shall be securely fastened with bolts or rivets.

#### END-HANDHOLDS.

NUMBER: Four (4). [*Cars equipped with safety-gates do not require end-platform handholds.*]

DIMENSIONS: Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches metal.

LOCATION: Horizontal from or near door-post to a point not more than twelve (12) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform. Horizontal portion shall be not less than twenty-four (24) inches in length nor more than forty (40) inches above platform.

MANNER OF APPLICATION: End-platform handholds shall be securely fastened with bolts, rivets or screws.

#### UNCOUPLING-LEVERS.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling-attachment, forty-two (42) inches, measured from center of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service the uncoupling attachments shall be so applied that the coupler can be operated from left side of car.

## PASSENGER-TRAIN CARS WITHOUT END- PLATFORMS.

### HAND-BRAKES.

**NUMBER:** Each passenger-train car shall be equipped with an efficient hand-brake which shall operate in harmony with the power-brake thereon.

**LOCATION:** Each hand-brake shall be so located that it can be safely operated while car is in motion.

### SILL-STEPS.

**NUMBER:** Four (4).

**DIMENSIONS:** Minimum length of tread ten (10), preferably twelve (12) inches.

Minimum cross-sectional area one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, wrought iron or steel.

Minimum clear depth eight (8) inches.

**LOCATION:** One (1) near each end on each side not more than twenty-four (24) inches from corner of car to center of tread of sill-step.

Outside edge of tread of step shall be not more than two (2) inches inside of face of side of car.

Tread shall be not more than twenty-four (24), preferably not more than twenty-two (22) inches above the top of rail.

**MANNER OF APPLICATION:** Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Sill-steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible)

and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

#### SIDE-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) preferably twenty-four (24) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Horizontal or vertical: One (1) near each end on each side of car over sill-step.

If horizontal, not less than twenty-four (24) nor more than thirty (30) inches above center line of coupler.

If vertical, lower end not less than eighteen (18) nor more than twenty-four (24) inches above center line of coupler.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with bolts, rivets or screws.

#### END-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, sixteen (16) inches.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Horizontal: One (1) near each side on each end projecting downward from face of end-sill or sheathing. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of car.

MANNER OF APPLICATION: Handholds shall be flush with or project not more than one (1) inch beyond face of end-sill.

End-handholds shall be securely fastened with bolts or rivets.

When marker-sockets or brackets are located so that they cannot be conveniently reached from platforms, suitable steps



and handholds shall be provided for men to reach such sockets or brackets.

#### END-HANDRAILS.

[*On cars with projecting end-sills.*]

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) on each side of each end, extending horizontally from door-post or vestibule-frame to a point not more than six (6) inches from corner of car, then approximately vertical to a point not more than six (6) inches from top of platform end-sill; horizontal portion shall be not less than thirty (30) nor more than sixty (60) inches above platform end-sill.

MANNER OF APPLICATION: End hand-rails shall be securely fastened with bolts, rivets or screws.

#### SIDE-DOOR STEPS.

NUMBER: One (1) under each door.

DIMENSIONS: Minimum length of tread, ten (10), preferably twelve (12) inches.

Minimum cross-sectional area, one-half ( $\frac{1}{2}$ ) by one and one-half ( $1\frac{1}{2}$ ) inches or equivalent, wrought iron or steel.

Minimum clear depth, eight (8) inches.

LOCATION: Outside edge of tread of step not more than two (2) inches inside of face of side of car.

Tread not more than twenty-four (24), preferably not more than twenty-two (22) inches above the top of rail.

MANNER OF APPLICATION: Steps exceeding eighteen (18) inches in depth shall have an additional tread and be laterally braced.

Side-door steps shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half ( $\frac{1}{2}$ ) inch rivets.

A vertical handhold not less than twenty-four (24) inches in clear length shall be applied above each side-door step on door-post.

#### UNCOUPLING-LEVERS.

Uncoupling attachments shall be applied so they can be operated by a person standing on the ground.

Minimum length of ground uncoupling-attachment, forty-two (42) inches, measured from center line of end of car to handle of attachment.

On passenger-train cars used in freight or mixed-train service, the uncoupling attachment shall be so applied that the coupler can be operated from the left side of car.

#### STEAM LOCOMOTIVES USED IN ROAD SERVICE.

##### TENDER SILL-STEPS.

NUMBER: Four (4) on tender.

DIMENSIONS: Bottom tread not less than eight (8) by twelve (12) inches, metal.

*[May have wooden treads.]*

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12) inches.

LOCATION: One (1) near each corner of tender on sides.

MANNER OF APPLICATION: Tender sill-steps shall be securely fastened with bolts or rivets.

##### PILOT SILL-STEPS.

NUMBER: Two (2).

DIMENSIONS: Tread not less than eight (8) inches in width by ten (10) inches in length, metal.

*[May have wooden treads.]*

LOCATION: One (1) on or near each end of buffer-beam outside of rail and not more than sixteen (16) inches above rail.

MANNER OF APPLICATION: Pilot sill-steps shall be securely fastened with bolts or rivets.

## PILOT-BEAM HANDHOLDS.

NUMBER: Two (2).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14), preferably sixteen (16), inches.

Minimum clearance, two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: One (1) on each end of buffer-beam.

*[If uncoupling-lever extends across front end of locomotive to within eight (8) inches of end of buffer-beam, and is seven-eighths ( $\frac{7}{8}$ ) of an inch or more in diameter, securely fastened, with a clearance of two and one-half ( $2\frac{1}{2}$ ) inches, it is a handhold.]*

MANNER OF APPLICATION: Pilot-beam handholds shall be securely fastened with bolts or rivets.

## SIDE-HANDHOLDS.

NUMBER: Six (6).

DIMENSIONS: Minimum diameter, if horizontal, five-eighths ( $\frac{5}{8}$ ) of an inch; if vertical, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Horizontal, minimum clear length, sixteen (16) inches.

Vertical, clear length equal to approximate height of tank.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Horizontal or vertical: If vertical, one (1) on each side of tender within six (6) inches of rear or on corner, if horizontal, same as specified for "Box and other house cars."

One (1) on each side of tender near gangway; one (1) on each side of locomotive at gangway; applied vertically.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

## REAR-END HANDHOLDS.

NUMBER: Two (2).

DIMENSIONS: Minimum diameter, five-eighths ( $\frac{5}{8}$ ) of an inch, wrought iron or steel.

Minimum clear length, fourteen (14) inches.

Minimum clearance two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Horizontal: One (1) near each side of rear end of tender on face of end-sill. Clearance of outer end of handhold shall be not more than sixteen (16) inches from side of tender.

MANNER OF APPLICATION: Rear-end handholds shall be securely fastened with not less than one-half ( $\frac{1}{2}$ ) inch bolts or rivets.

#### UNCOUPLING-LEVERS.

NUMBER: Two (2) double levers, operative from either side.

DIMENSIONS: Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9) inches from side of tender with a guard bent on handle to give not less than two (2) inches clearance around handle.

LOCATION: One (1) on rear end of tender and one (1) on front end of locomotive.

Handles of front-end levers shall be not more than twelve (12), preferably nine (9) inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

MANNER OF APPLICATION: Uncoupling-levers shall be securely fastened with bolts or rivets.

#### COUPLERS.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

#### STEAM LOCOMOTIVES USED IN SWITCHING SERVICE.

##### FOOTBOARDS.

NUMBER: Two (2) or more.

DIMENSIONS: Minimum width of tread, ten (10) inches, wood.

Minimum thickness of tread, one and one-half ( $1\frac{1}{2}$ ), preferably two (2) inches.

Minimum height of back-stop, four (4) inches above tread.

Height from top of rail to top of tread, not more than twelve (12) nor less than nine (9) inches.

LOCATION: Ends or sides.

If on ends, they shall extend not less than eighteen (18) inches outside of gauge of straight track, and shall be not more than twelve (12) inches shorter than buffer-beam at each end.

MANNER OF APPLICATION: End footboards may be constructed in two (2) sections, *provided* that practically all space on each side of coupler is filled; each section shall be not less than three (3) feet in length.

Footboards shall be securely bolted to two (2) one (1) by four (4) inches metal brackets, *provided* footboard is not cut or notched at any point.

If footboard is cut or notched or in two (2) sections, not less than four (4) one (1) by three (3) inches metal brackets shall be used, two (2) located on each side of coupler. Each bracket shall be securely bolted to buffer-beam, end-sill or tank-frame by not less than two (2) seven-eighths ( $\frac{7}{8}$ ) inch bolts.

If side footboards are used, a substantial handhold or rail shall be applied not less than thirty (30) inches nor more than sixty (60) inches above tread of footboard.

#### SILL-STEPS.

NUMBER: Two (2) or more.

DIMENSIONS: Lower tread of step shall be not less than eight (8) by twelve (12) inches, metal. [*May have wooden treads.*]

If stirrup-steps are used, clear length of tread shall be not less than ten (10), preferably twelve (12) inches.

LOCATION: One (1) or more on each side at gangway secured to locomotive or tender.

MANNER OF APPLICATION: Sill-steps shall be securely fastened with bolts or rivets.



## END-HANDHOLDS.

NUMBER: Two (2).

DIMENSIONS: Minimum diameter, one (1) inch, wrought iron or steel.

Minimum clearance, four (4) inches, *except* at coupler casting or braces, when minimum clearance shall be two (2) inches.

LOCATION: One (1) on pilot buffer-beam; one (1) on rear end of tender, extending across front end of locomotive and rear end of tender. Ends of handholds shall be not more than six (6) inches from ends of buffer-beam or end-sill, securely fastened at ends.

MANNER OF APPLICATION: End-handholds shall be securely fastened with bolts or rivets.

## SIDE-HANDHOLDS.

NUMBER: Four (4).

DIMENSIONS: Minimum diameter, seven-eighths ( $\frac{7}{8}$ ) of an inch, wrought iron or steel.

Clear length equal to approximate height of tank.

Minimum clearance, two (2), preferably two and one-half ( $2\frac{1}{2}$ ) inches.

LOCATION: Vertical: One (1) on each side of tender near front corner; one (1) on each side of locomotive at gangway.

MANNER OF APPLICATION: Side-handholds shall be securely fastened with bolts or rivets.

## UNCOUPLING-LEVERS.

NUMBER: Two (2) double levers, operative from either side.

DIMENSIONS: Handles of front-end levers shall be not more than twelve (12), preferably nine (9) inches from ends of buffer-beam, and shall be so constructed as to give a minimum clearance of two (2) inches around handle.

Rear-end levers shall extend across end of tender with handles not more than twelve (12), preferably nine (9), inches from side of tender, with a guard bent on handle to give not less than two (2) inches clearance around handle.

LOCATION: One (1) on rear end of tender and one (1) on front end of locomotive.

#### HANDRAILS AND STEPS FOR HEADLIGHTS.

Switching-locomotive with sloping tenders with manhole or headlight located on sloping portion of tender shall be equipped with secure steps and handrail or with platform and handrail leading to such manhole or headlight.

#### END-LADDER CLEARANCE.

No part of locomotive or tender *except* draft-rigging, coupler and attachments, safety-chains, buffer-block, foot-board, brake-pipe, signal-pipe, steam-heat pipe or arms of uncoupling-lever shall extend to within fourteen (14) inches of a vertical plane passing through the inside face of knuckle when closed with horn of coupler against buffer-block or end-sill.

#### COUPLERS.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

### SPECIFICATIONS COMMON TO ALL STEAM LOCOMOTIVES.

#### HAND-BRAKES.

Hand-brakes will not be required on locomotives nor on tenders when attached to locomotives.

If tenders are detached from locomotives and used in special service, they shall be equipped with efficient hand-brakes.

#### RUNNING-BOARDS.

NUMBER: Two (2).

DIMENSIONS: Not less than ten (10) inches wide. If of wood, not less than one and one-half ( $1\frac{1}{2}$ ) inches in thickness; if of metal, not less than three-sixteenths ( $\frac{3}{16}$ ) of an inch, properly supported.

LOCATION: One (1) on each side of boiler extending from cab to front end near pilot-beam. [*Running-boards may be*

*in sections. Flat-top steam-chests may form section of running-board.]*

MANNER OF APPLICATION: Running boards shall be securely fastened with bolts, rivets or studs.

Locomotives having Wootten type boilers with cab located on top of boiler more than twelve (12) inches forward from boiler-head shall have suitable running-boards running from cab to rear of locomotive, with handrailings not less than twenty (20) nor more than forty-eight (48) inches above outside edge of running-boards, securely fastened with bolts, rivets or studs.

#### HANDRAILS.

NUMBER: Two (2) or more.

DIMENSIONS: Not less than one (1) inch in diameter, wrought iron or steel.

LOCATION: One (1) on each side of boiler extending from near cab to near front end of boiler, and extending across front end of boiler, not less than twenty-four (24) nor more than sixty-six (66) inches above running-board.

MANNER OF APPLICATION: Handrails shall be securely fastened to boiler.

#### TENDERS OF VANDERBILT TYPE.

Tenders known as the Vanderbilt type shall be equipped with running-boards; one (1) on each side of tender not less than ten (10) inches in width and one (1) on top of tender not less than forty-eight (48) inches in width, extending from coal space to rear of tender.

There shall be a handrail on each side of top running-board, extending from coal space to rear of tank, not less than one (1) inch in diameter and not less than twenty (20) inches in height above running-board from coal space to manhole.

There shall be a handrail extending from coal space to within twelve (12) inches of rear of tank, attached to each side of tank above side running-board, not less than thirty (30) nor more than sixty-six (66) inches above running-board.

There shall be one (1) vertical end-handhold on each side of Vanderbilt type of tender, located within eight (8) inches of rear of tank extending from within eight (8) inches of top of end-sill to within eight (8) inches of side handrail. Post supporting rear end of side running-board if not more than two (2) inches in diameter and properly located, may form section of handhold.

An additional horizontal end-handhold shall be applied on rear end of all Vanderbilt type of tenders which are not equipped with vestibules. Handhold to be located not less than thirty (30) nor more than sixty-six (66) inches above top of end-sill. Clear length of handhold to be not less than forty-eight (48) inches.

Ladders shall be applied at forward ends of side running-boards.

#### HANDRAILS AND STEPS FOR HEADLIGHTS.

Locomotives having headlights which can not be safely and conveniently reached from pilot-beam or steam-chests shall be equipped with secure handrails and steps suitable for the use of men in getting to and from such headlights.

A suitable metal end or side-ladder shall be applied to all tanks more than forty-eight (48) inches in height, measured from the top of end-sill, and securely fastened with bolts or rivets.

#### COUPLERS.

Locomotives shall be equipped with automatic couplers at rear of tender and front of locomotive.

Cars of construction not covered specifically in the foregoing sections, relative to handholds, sill-steps, ladders, hand-brakes and running-boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sill-steps, ladders, hand-brakes and running-boards as are required for cars of the nearest approximate type.

“RIGHT” or “LEFT” refers to side of person when facing end or side of car from ground.

To provide for the usual inaccuracies of manufacturing and for wear, where sizes of metal are specified, a total variation of five (5) per cent. below size given is permitted.

*And it is further ordered,* That a copy of this order be at once served on all common carriers, subject to the provisions of said act, in a sealed envelope by registered mail.

By the Commission:

EDWARD A. MOSELEY, *Secretary.*

A true copy.

EDW. A. MOSELEY,  
*Secretary.*

## INTERSTATE COMMERCE COMMISSION.

### ORDER.

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 13TH DAY OF MARCH, A. D. 1911.

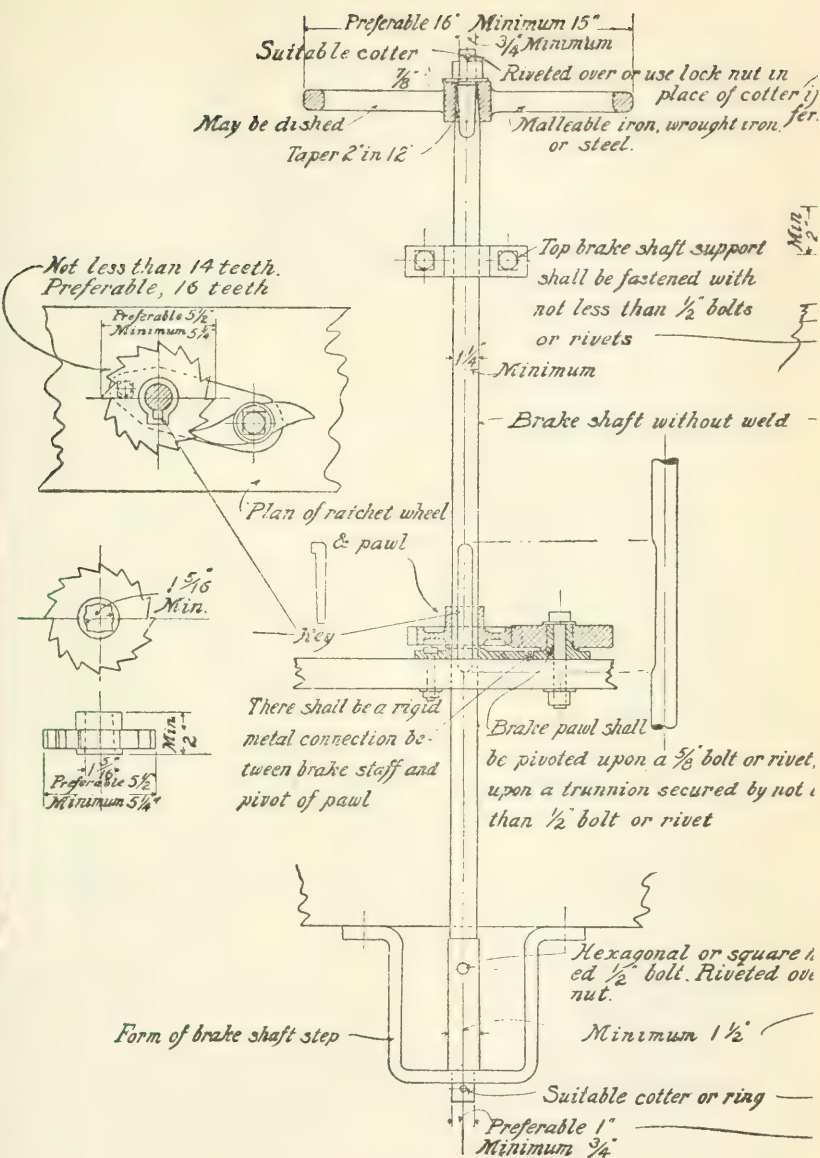
#### *Present:*

JUDSON C. CLEMENTS,  
CHARLES A. PROUTY,  
FRANKLIN K. LANE,  
EDGAR E. CLARK,  
JAMES S. HARLAN,  
CHARLES C. McCHORD,  
BALTHASAR H. MEYER,

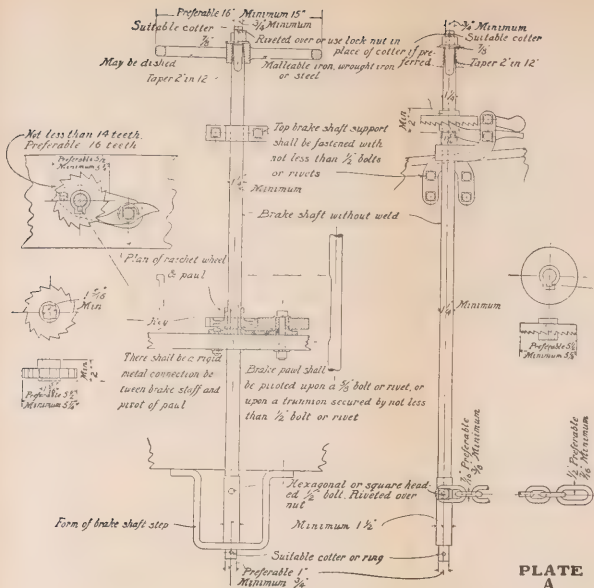
Commissioners.

IN THE MATTER OF THE EXTENSION OF THE PERIOD WITHIN WHICH COMMON CARRIERS SHALL COMPLY WITH THE REQUIREMENTS OF AN ACT ENTITLED, "AN ACT TO SUPPLEMENT 'AN ACT TO PROMOTE THE SAFETY OF EMPLOYEES AND TRAVELERS UPON RAILROADS BY COMPELLING COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE TO EQUIP THEIR CARS WITH AUTOMATIC COUPLERS AND CONTINUOUS





[Any efficient arrangement of ratchet-wheel and pa



**PLATE**  
**A**

[Any efficient arrangement of ratchet-wheel and pawl may be used.]

BRAKES AND THEIR LOCOMOTIVES WITH DRIVING-WHEEL BRAKES AND FOR OTHER PURPOSES,' AND OTHER SAFETY APPLIANCE ACTS, AND FOR OTHER PURPOSES," APPROVED APRIL 14, 1910, AS AMENDED BY "AN ACT MAKING APPROPRIATIONS FOR SUNDRY CIVIL EXPENSES OF THE GOVERNMENT FOR THE FISCAL YEAR ENDING JUNE 30, 1912, AND FOR OTHER PURPOSES," APPROVED MARCH 4, 1911.

WHEREAS, Pursuant to the provisions of the act above stated, the Interstate Commerce Commission, by its orders duly made and entered on October 13, 1910, and March 13, 1911, has designated the number, dimensions, location, and manner of application of the appliances provided for by Section 2 of the act aforesaid and Section 4 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903, known as the "Safety Appliance Acts"; and whereas the matter of extending the period within which common carriers shall comply with the provisions of Section 2 of the act first aforesaid being under consideration, upon full hearing and for good cause shown:

*It is ordered*, That the period of time within which said common carriers shall comply with the provisions of Section 3 of said act in respect of the equipment of cars in service on the 1st day of July, 1911, be, and the same is hereby, extended as follows, to-wit:

#### FREIGHT-TRAIN CARS.

(a) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end-sills, or to change the end-ladders on such cars, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed in said order of March 13, 1911.

(b) Carriers are granted an extension of five years from July 1, 1911, to change the location of brakes on all cars other

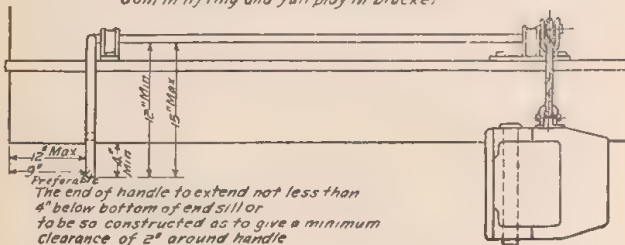
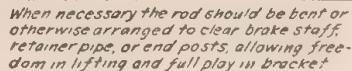
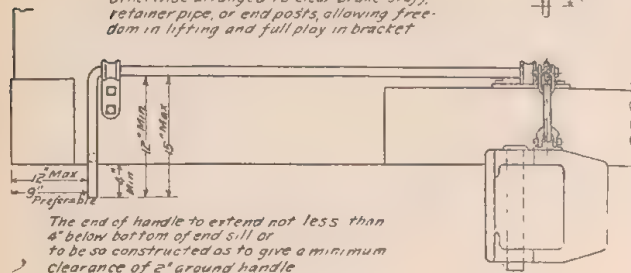
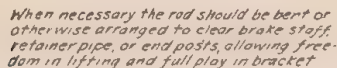
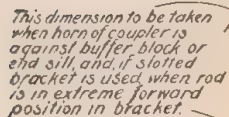
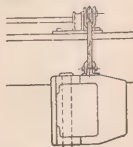
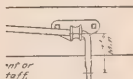
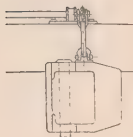
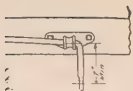


PLATE  
B



PLATE  
A



ATE  
B

awl may be used.]



than those designated in paragraph (a) to comply with the standards prescribed in said order.

(c) Carriers are granted an extension of five years from July 1, 1911, to comply with the standards prescribed in said order in respect of all brake specifications contained therein, other than those designated in paragraphs (a) and (b), on cars of all classes.

(d) Carriers are not required to make changes to secure additional end-ladder clearance on cars that have ten or more inches end-ladder clearance, within thirty inches of side of car, until car is shopped for work amounting to practically rebuilding body of car, at which time they must be made to comply with the standards prescribed in said order.

(e) Carriers are granted an extension of five years from July 1, 1911, to change cars having less than ten inches end-ladder clearance, within thirty inches of side of car, to comply with the standards prescribed in said order.

(f) Carriers are granted an extension of five years from July 1, 1911, to change and apply all other appliances on freight-train cars to comply with the standards prescribed in said order, except that when a car is shopped for work amounting to practically rebuilding body of car, it must then be equipped according to the standards prescribed in said order in respect to handholds, running-boards, ladders, sill-steps, and brake-staffs: *Provided*, That the extension of time herein granted is not to be construed as relieving carriers from complying with the provisions of Section 4 of the Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

(g) Carriers are not required to change the location of handholds (except end-handholds under end-sills), ladders, sill-steps, brake-wheels, and brake-staffs on freight-train cars where the appliances are within three inches of the required location, except that when cars undergo regular repairs they must be made to comply with the standards prescribed in said order.

## PASSENGER-TRAIN CARS.

(h) Carriers are granted an extension of three years from July 1, 1911, to change passenger-train cars to comply with the standards prescribed in said order.

## LOCOMOTIVES, SWITCHING.

(i) Carriers are granted an extension of one year from July 1, 1911, to change switching locomotives to comply with the standards prescribed in said order.

## LOCOMOTIVES, OTHER THAN SWITCHING.

(j) Carriers are granted an extension of two years from July 1, 1911, to change all locomotives of other classes to comply with the standards prescribed in said order.

A true copy.

EDW. A. MOSELEY,  
*Secretary.*

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BOILER INSPECTION LAW.

36 U. S. Stat. at L. 913.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any territory of the United States, or from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as

used in this Act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That from and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

SEC. 3. That there shall be appointed by the President, by and with the advice and consent of the Senate, a chief inspector and two assistant chief inspectors of locomotive boilers, who shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of this Act and the rules, regulations, and instructions made or given hereunder are observed by common carriers subject hereto. The said chief inspector and his two assistants shall be selected with reference to their practical knowledge of the construction and repairing of boilers, and to their fitness and ability to systematize and carry into effect the provisions hereof relating to the inspection and maintenance of locomotive boilers. The chief inspector shall receive a salary of four thousand (\$4000) dollars per year, and the assistant chief inspectors shall each receive a salary of three thousand (\$3000) dollars per year; and each of the three shall be paid his traveling expenses incurred in the performance of his

duties. The office of the chief inspector shall be in Washington, District of Columbia, and the Interstate Commerce Commission shall provide such stenographic and clerical help as the business of the offices of the chief inspector and his said assistants may require.

SEC. 4. That immediately after his appointment and qualification the chief inspector shall divide the territory comprising the several states, the territories of New Mexico and Arizona, and the District of Columbia into fifty locomotive boiler-inspection districts, so arranged that the service of the inspector appointed for each district shall be most effective, and so that the work required of each inspector shall be substantially the same. Thereupon there shall be appointed by the Interstate Commerce Commission fifty inspectors of locomotive boilers. Said inspectors shall be in the classified service, and shall be appointed after competitive examination according to the law and the rules of the Civil Service Commission governing the classified service. The chief inspector shall assign one inspector so appointed to each of the districts hereinbefore named. Each inspector shall receive a salary of one thousand eight hundred (\$1,800) dollars per year and his traveling expenses while engaged in the performance of his duty. He shall receive in addition thereto an annual allowance for office rent, stationery, and clerical assistance, to be fixed by the Interstate Commerce Commission, but not to exceed in the case of any district inspector six hundred (\$600) dollars per year. In order to obtain the most competent inspectors possible, it shall be the duty of the chief inspector to prepare a list of questions to be propounded to applicants with respect to construction, repair, operation, testing, and inspection of locomotive boilers, and their practical experience in such work, which list, being approved by the Interstate Commerce Commission, shall be used by the Civil Service Commission as a part of its examination. No person interested, either directly or indirectly, in any patented article required to be used on any locomotive under supervision, or who is intemperate in his habits, shall be



eligible to hold the office either of chief inspector or assistant or district inspector.

SEC. 5. That each carrier subject to this Act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the Commission requires, shall become obligatory upon such carrier: *Provided, however*, that if any carrier subject to this Act shall fail to file its rules and instructions, the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served on the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: *Provided, also*, that such common carrier may, from time to time, change the rules and regulations herein provided for, but such change shall not take effect, and the new rules and regulations be in force, until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office, and for the government of the district inspectors: *Provided, however*, that all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

SEC. 6. That it shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work. Each inspector shall make such personal inspection of the locomotive boilers under his care, from time to time, as may be necessary to



fully carry out the provisions of this Act, and as may be consistent with his other duties, but he shall not be required to make such inspections at stated times or at regular intervals. His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service. To this end each carrier subject to this Act shall file with the inspector in charge, under the oath of the proper officer or employee, a duplicate of the report of each inspection required by such rules and regulations, and shall also file with such inspector, under the oath of the proper officer or employee, a report showing the repair of the defects disclosed by the inspection. The rules and regulations hereinbefore provided for shall prescribe the time at which such reports shall be made. Whenever any district inspector shall, in the performance of his duty, find any locomotive boiler or apparatus pertaining thereto not conforming to the requirements of the law or rules and regulations established and approved as hereinbefore stated, he shall notify the carrier in writing that the locomotive is not in serviceable condition, and thereafter such boiler shall not be used until in serviceable condition: *Provided*, that a carrier, when notified by an inspector in writing that a locomotive boiler is not in serviceable condition, because of defects set out and described in said notice, may, within five days after receiving said notice, appeal to the chief inspector by telegraph or by letter to have said boiler re-examined, and upon receipt of the appeal from the inspector's decision, the chief inspector shall assign one of the assistant chief inspectors, or any district inspector other than the one from whose decision the appeal is taken, to re-examine and inspect said boiler within fifteen days from date of notice. If on such re-examination the boiler is found in serviceable condition, the chief inspector shall immediately notify the carrier in writing, whereupon such boiler may be put into service

without further delay; but if the re-examination of said boiler sustains the decision of the district inspector, the chief inspector shall at once notify the carrier owning or operating such locomotive that the appeal from the decision of the inspector is dismissed, and upon receipt of such notice the carrier may, within thirty days, appeal to the Interstate Commerce Commission, and, on such appeal, and after hearing, said Commission shall have power to revise, modify, or set aside such action of the chief inspector and declare that said locomotive is in serviceable condition, and authorize the same to be operated: *Provided, further*, that pending either appeal the requirements of the inspector shall be effective.

SEC. 7. That the chief inspector shall make an annual report to the Interstate Commerce Commission of the work done during the year, and shall make such recommendations for the betterment of the service as he may desire.

SEC. 8. That in the case of accident resulting from failure from any cause of a locomotive boiler, or its appurtenances, resulting in serious injury or death to one or more persons, a statement forthwith must be made in writing of the fact of such accident, by the carrier owning or operating said locomotive, to the chief inspector. Whereupon the facts concerning such accident shall be investigated by the chief inspector or one of his assistants, or such inspector as the chief inspector may designate for that purpose. And where the locomotive is disabled to the extent that it can not be run by its own steam, the part or parts affected by the said accident shall be preserved by said carrier intact, so far as possible, without hindrance or interference to traffic until after said inspection. The chief inspector or an assistant, or the designated inspector making the investigation, shall examine or cause to be examined thoroughly the boiler or part affected, making full and detailed report of the cause of the accident to the chief inspector.

The Interstate Commerce Commission may, at any time, call on the chief inspector for a report of any accident embraced in this section, and, on the receipt of said report, if

it deems it to the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper. Neither said report nor any report of said investigation, nor any part thereof, shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation.

SEC. 9. That any common carrier violating this Act, or any rule or regulation made under its provisions, or any lawful order of any inspector, shall be liable to a penalty of one hundred (\$100) dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such attorneys, subject to the direction of the Attorney-General, to bring such suits upon duly verified information being lodged with them, respectively, of such violations having occurred; and it shall be the duty of the chief inspector of locomotive boilers to give information to the proper United States attorney of all violations of this Act coming to his knowledge.

SEC. 10. That the total amounts directly appropriated to carry out the provisions of this Act shall not exceed for any one fiscal year the sum of three hundred thousand (\$300,000) dollars.

Approved, February 17, 1911.

## APPENDIX E.

### ASH PANS

AN ACT To promote the safety of employees on railroads.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

SEC. 2. That on and after the first day of January, nineteen hundred and ten, it shall be unlawful for any common carrier by railroad in any Territory of the United States or of the District of Columbia to use any locomotive not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive.

SEC. 3. That any any such common carrier using any locomotive in violation of any of the provisions of this Act shall be liable to a penalty of two hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge

with the proper district attorneys information of any such violations as may come to its knowledge.

SEC. 4. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

SEC. 5. That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 6. That nothing in this Act contained shall apply to any locomotive upon which, by reason of the use of oil, electricity, or other such agency, an ash pan is not necessary.

Approved, May 30, 1908.



## APPENDIX F.

### HOURS OF LABOR FOR RAILROAD MEN.

AN ACT To promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this Act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved

and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty; *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week: *Provided further*, The Interstate Commerce Commission may after full hearing in a particular case and for good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys in-

formation of any such violations as may come to his knowledge. In all prosecutions under this Act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided*, That the provisions of this Act shall not apply in any case of casualty or unavoidable accident or the act of God nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this Act and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this Act.

SEC. 5. That this Act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11:50 a. m.

## APPENDIX G.

### DECISIONS UNREPORTED (MARCH 23, 1909,) UNDER THE SAFETY APPLIANCE ACTS.

[My thanks are due to Mr. Edward A. Moseley, Secretary of the Interstate Commerce Commission, for these decisions. The first two are taken from the pamphlet published by the Interstate Commerce Commission, April 1, 1907. The remainder are on separate sheets furnished me by Mr. Moseley.]

#### UNITED STATES *v.* EL PASO AND SOUTHWESTERN RAILROAD COMPANY.

(In the District Court of the Second Judicial District of the Territory  
of Arizona.)

1. Though the complaint for violation of the Federal safety appliance acts in this case does not allege that the defendant is a common carrier engaged in interstate commerce, it does allege that the defendant is a common carrier engaged in commerce by railroad among the several Territories of the United States, particularly the Territories of Arizona and New Mexico, and that is sufficient, as the interterritorial commerce therein alleged is equivalent, under the Safety-Appliance Act of 1903, to interstate commerce under the original act of 1893.
2. Where a coupler couples by impact, but cannot be uncoupled unless the employe goes between or over the cars, or around the end of the train, in order to reach the appliance on the connecting car, such a coupling is defective and prohibited by law, as it makes it reasonably necessary for the employe to go between the ends of the cars to uncouple such a car.

J. L. B. ALEXANDER, *United States Attorney*, for the  
United States.

HERRING, SORIN & ELMWOOD and HAWKINS & FRANKLIN,  
for the defendant.

(Decided January 30, 1907.)

*DOAN Judge:*

This action was brought under the act of Congress known as the "safety-appliance act," approved March 2, 1893, as amended by an act approved April 1, 1896, and as amended by an act approved March 2, 1903, contained respectively in the Twenty-seventh Statutes at Large, page 531, in the Twenty-ninth Statutes at Large, page 85, and in the Thirty-second Statutes at Large, page 943.

The plaintiff alleged that the defendant "is a common carrier engaged in commerce by railroad among the several Territories of the United States, and particularly the Territories of Arizona and New Mexico," and then alleged that in violation of the said act as amended the "defendant on March 3, 1906, hauled over its line of railroad a certain car generally engaged in the movement of interstate traffic, when the coupling and uncoupling apparatus on the A end of said car was out of repair and inoperative, necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 2 of the said "safety-appliance act, as amended by section 1 of the act of March 2, 1903," and by reason of the violation of the said act the defendant was liable to the plaintiff in the sum of \$100.

The second and third causes of action were for similar acts in violation of the law alleged as to certain other cars hauled by the defendant on its said road, on or about the same date, and the fourth was for using at the same time on its line of railroad one locomotive for switching at its yards in Douglas, Ariz., cars containing interstate traffic.

It was urged by the defendant that the "safety-appliance act" was confined in its operations to common carriers engaged in interstate commerce by railroad, and that there



was no allegation in the complaint in this instance that the defendant was engaged in interstate commerce.

Section 1 of the act of 1893 provides: "It shall be unlawful for any common carrier engaged in interstate commerce to use on its line," etc.

Section 2 provides:

It shall be unlawful for any such common carrier to haul, or to permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of a man going between the ends of the cars, etc.

The act of March 2, 1903, provides in section 1:

That the provisions and requirements of the act . . . approved March 2, 1893, and amended April 1, 1896, shall be held to apply to common carriers by railroad in the Territories and the District of Columbia.

The plaintiff in this case in each instance has alleged that the car alleged to have been handled in violation of the act was "a car generally used in the movement of interstate traffic," or "was engaged in moving traffic in and between the Territories of the United States," and although the complaint did not in so many words allege that the defendant was "a common carrier engaged in interstate commerce by railroad," it did allege that it was "a common carrier engaged in commerce by railroad among the several Territories of the United States, particularly the Territories of Arizona and New Mexico," which allegation, under the provisions of section 1 of the act of 1903, that declares that the "safety-appliance act" shall be held to apply to common carriers by railroad in the Territories and the District of Columbia, is sufficient. The interterritorial commerce therein alleged being equivalent under the act of 1903 to interstate commerce under the original act of March 2, 1893.

The violations of the act were established by the un-

disputed testimony in the case, except in the one instance where it was proven that the coupling appliances on one end of the car hauled were perfect, and that the coupling appliances on the other end of the car were such as would couple by impact; and it was alleged by the defendant that although the coupling appliances on the end of the car complained of were so damaged, and thereby imperfect, that they could not be operated by a man without the necessity of his going between the cars, that when coupled to the adjoining car on which the appliances were in perfect order the car could be uncoupled from the adjoining car without a man or men going in between the cars. The proof developed that this car was coupled into the body of a train, and that if a brakeman was sent along the train to uncouple the car on the side of the train on which this coupling rod should be that the coupling rod on the adjoining car would naturally be on the other side of the train, and it presented a question (in the absence of proof on the part of the defendant that the adjoining car was furnished with a double arm or rod—that is, one extending on each side of the car, as is in some instances provided) whether the car so coupled that it could not be uncoupled on the side to which the brakeman would naturally be sent to uncouple it without the necessity of a man going between the cars for the purpose of uncoupling, but that it could be uncoupled by operating the coupling rod on the adjoining car by the brakeman going around the end of the train in order to reach it on the other side, or by his climbing up the car, crossing over the top and climbing down on the other side, was, in the contemplation of the law, one which “could be uncoupled without the necessity of a man going between the cars.”

It was contended by the defendant that in construing this statute we must take into consideration the fact that it is a penal statute, and therefore should be strictly construed, while the plaintiff insisted that it is a remedial

statute, and is enacted for the protection of the lives and limbs of the numerous railroad employees and therefore should be liberally construed. We feel justified in giving a sufficiently liberal construction to the language employed to enable the statute to conserve the ends evidently intended by the legislators, and while it may not be successfully maintained that a car coupled as above renders it absolutely necessary for a man to go between the ends of the cars to uncouple it, our knowledge of the manner in which freight trains of our interstate railroads are handled convinces us that it is reasonably necessary for the man to go between the ends of the cars to uncouple such a car. There is no assurance that the conditions of the track or the length of the train would be such at the time that the car might need to be uncoupled that the brakeman could go around the end of a train to the operating rod on the other side of the adjoining car and effect the uncoupling in the time allowed for such purpose, or that the condition of the car or the adjoining car would be such that he could climb over the top of the car and down the other side, even if sufficient time were allowed, without incurring fully as much danger to his person as by stepping in between the ends of the cars and effecting the uncoupling by hand. It is reasonably certain that in a great majority of cases, if not, in fact, invariably, the brakeman, confronted with the necessity of adopting one of these three courses, would go in between the cars and effect the uncoupling by hand. We consider that hauling a car with a coupling in such damaged or imperfect condition as to present the necessity of this election to the employee is a violation of the act in the ordinary meaning of the words used, according to the true intent of the legislators.

Judgment is rendered for the plaintiff in accordance with the prayer of the complaint in the four several causes of action.

UNITED STATES OF AMERICA *v.* EL PASO & SOUTHWESTERN RAILROAD COMPANY AND EL PASO & SOUTHWESTERN RAILROAD COMPANY  
OF TEXAS.

(U. S. District Court, Western District of Texas.)

1. The allegation that this action was brought "upon suggestion of the Attorney-General of the United States, at the request of the Interstate Commerce Commission, and upon information furnished by said Commission," substantially complies with section 6 of the act of March 2, 1893, as amended, when it appears that such information was furnished to the Commission by inspectors of safety appliances, who are acting under oath of office.
2. In stating a cause of action to recover a penalty under the Safety Appliance Acts, it is not necessary that there be an allegation that the acts complained of were intentionally and willfully done.
3. The highest degree of care in inspection and making such repairs as that inspection disclosed is not in any way a defense in an action brought to recover a penalty for violation of the Safety Appliance Act.

CHARLES A. BOYNTON, *United States Attorney*, and  
LUTHER M. WALTER, *special assistant United States attorney*,  
for the United States.

PATTERSON, BUCKLER & WOODSON and HAWKINS &  
FRANKLIN, for the defendants.

The following pleading was filed by the defendants:

Now come the defendants in the above-styled cause and say that they are common carriers engaged in commerce by railroad in the Territories of Arizona and New Mexico and in the State of Texas, and they except specially to the complaint of the plaintiff filed herein for the reason that the same is not verified as required by the provisions of section 6 of the act of March 2, 1893, and amended by the act of April 1, 1896 (Chapter 87, 29 Stat. L., p. 85).

2d. Said defendants except specially to said complaint for the reason that it does not appear from the same that

duly verified information respecting the matters therein alleged was ever filed with the United States District Attorney.

3rd. Defendants except specially to the first count in said complaint for the reason that it is not alleged that the acts therein complained of were intentionally or willfully done.

4th. And defendants except specially to the second count in said complaint contained for the reason that it is not alleged that the acts therein complained of were intentionally or willfully done.

5th. And defendants except specially to the third count in said complaint contained for the reason that it is not alleged that the acts therein complained of were intentionally or willfully done.

6th. Defendants except specially to said complaint for the reason that the same does not show that it was filed in any way in accordance with or under the provisions of section 6 of the act of March 2, 1893, and amended by the act of April 1, 1896 (chapter 87, 29 Stat. L., p. 85).

7th. Defendants except specially to said complaint for the reason that it does not appear from the same that this court has jurisdiction over this cause.

8th. And further answering, defendants say that they are not guilty of the wrongs and acts complained of in this cause, and they deny all and singular the allegations in the plaintiff's complaint contained and of this they put themselves upon the country.

9th. And for further answer in this behalf, these defendants say that if said grab irons, couplers, and appliances mentioned in the petition of the plaintiff were in anywise defective, insufficient, or not in conformity with the laws of the United States that then such facts were not within the knowledge of these defendants or either of them, nor could the same have been discovered by these defendants by the highest degree of care in inspection; that immediately before using the said cars mentioned in said petition, these



defendants gave the said cars a rigorous inspection and used the highest degree of care and diligence to discover any defective condition about the same, or any grab irons, couplers, or other appliances thereof, and that by the use of such care they did not and could not discover the same; that if said cars were moved as alleged by plaintiff, which defendants deny, when any of the same, their appliances, couplers or grab irons were in a defective condition, that then the same was done by defendants inadvertently, without the knowledge of either of them, and without the consent of either of them, all of which these defendants are ready to verify.

MAXEY, *District Judge*, rendered the following judgment:

On this the 8th day of April, A. D. 1907, came on for trial by regular call the above numbered and entitled cause, whereupon came the plaintiff and the defendants, by their respective attorneys, and came on to be heard the demurrers and special exceptions of defendants, and the court having heard and considered the same is of the opinion that the same are not well taken and that the law is not with the defendants in the matter of the exceptions; and it is therefore ordered by the court that all of said exceptions be, and the same are hereby, overruled, to which action of the court the defendants excepted; and also came on to be heard and considered by the court the exception and demurrer filed by the plaintiff to the 9th paragraph of the defendants' answer herein, and the court having heard and considered the same is of the opinion that the same is well taken and that the law is with the plaintiff in the matter of said exception; and it is therefore ordered by the court that the said exception be, and the same is hereby, sustained, to which ruling of the court the defendants excepted.

Whereupon, upon motion of the district attorney, it is ordered by the court that this cause be, and the same is hereby, dismissed as to the defendant El Paso & Southwestern Railroad Company.

Whereupon both parties announce ready for trial, and a jury having been expressly waived by written stipulation filed herein, the matters of fact as well as of law were submitted to the court, and the court, after hearing the pleadings read, considering the evidence introduced and the argument of counsel, is of the opinion, and so finds, that the defendant El Paso & Southwestern Railroad Company of Texas, a corporation, is guilty of violations of the act of Congress known as the Safety Appliance Act, as set forth and charged in the three counts contained in plaintiff's petition, and is liable to plaintiff, the United States of America, in the sum of three hundred (\$300) dollars.

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, the United States of America, do have and recover of and from the defendant, El Paso & Southwestern Railroad Company of Texas, the sum of three hundred (\$300) dollars, with interest thereon from this date at the rate of six per cent. per annum, together with all costs in this behalf incurred and expended, for which execution may issue.

To which judgment and ruling of the court the defendant El Paso & Southwestern Railroad Company of Texas in open court excepted.

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## UNITED STATES *v.* WABASH RAILROAD COMPANY.

[In the District Court of the United States for the Eastern District of Illinois.]

[Affirmed as to third count and reversed as to first. 172 Fed. 864.]

(Syllabus by the court.)

1. In an action brought to recover the penalty provided in section 6 of the Safety Appliance Act for violation of that statute it is no defense to show that defendant has used diligence or care of any degree to keep the cars in a reasonably safe condition. The statute commands a duty. The defendant must perform that duty, and it moves cars in a defective condition at its peril.

## STATEMENT OF FACTS.

The Interstate Commerce Commission lodged with the United States attorney information showing violations of the safety appliance law by the Wabash Railroad Company. The declaration was in four counts, each count charging a violation of section 2 of the statute, the allegation being that the couplers were out of repair and inoperative. At the trial defendant offered evidence tending to show diligence and care in keeping the cars in a reasonably safe condition.

WILLIAM E. TRAUTMANN, *United States attorney*, GEORGE A. CROW, *assistant United States attorney*, and ULYSSES BUTLER, *special assistant United States attorney*, for the United States.

BRUCE CAMPBELL, for defendant.

(November 19, 1907.)

FRANCIS M. WRIGHT, *District Judge* (charging jury):

The defendant in this case is charged by the United States with having violated what is commonly known as the Safety Appliance Act, an act of Congress with reference to that subject, in four counts. This law was enacted for the purpose of securing the safety of persons engaged in operating trains in interstate traffic, and section 2 provides, being the section under which this declaration is framed, that—"On and after the 1st day of January, 1898, it shall be unlawful for any common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Now if you believe from the evidence in this case that the engine mentioned in the first count, I think it is, of the

declaration was used in moving interstate traffic, and that it was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, then you will find the defendant guilty on that count. And so it is with reference to all the other three counts in the declaration. If you believe from the evidence in the case that the cars, one or all of them, were used in moving interstate traffic, and that they were not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of men going between the ends of the cars, you will find the defendant guilty on all or any of the counts where you so believe. You have heard the testimony of the witnesses upon this subject. The witnesses for the Government have testified that the couplers were so out of order that they could not be coupled without a man going between the cars for that purpose. Now if you believe from the evidence that is true, and if you further believe from the evidence that the cars were used in moving interstate traffic, then you will find the defendant guilty.

The testimony of the defendant's witnesses as to the inspection of the cars was submitted here for the purpose of tending to show, as far as in your judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep the cars in a reasonably safe condition is not a question before you. That is no defense to this suit. This statute is commanding, and requires the defendant at its peril to keep the couplers in such condition that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under this declaration, and you will so find. That is about all the law and the evidence there is upon this subject in this case.

You have heard the testimony of all the witnesses, and you are the judges of the credibility of all the witnesses and of what the evidence proves, and you must determine the case solely upon the evidence in the case. If you find the defendant guilty, you will say: "We, the jury, find the defendant guilty on the first, second, third and fourth counts of the declaration." You may find the defendant guilty on some of the counts and not guilty on the others. In that case the form of your verdict will be: "We, the jury, find the defendant guilty" on whatever number of counts you do find the defendant guilty, and "not guilty" on whatever you find the defendant not guilty. If you find the defendant not guilty, you will say: "We, the jury, find the defendant not guilty."

There seems to be no dispute as to these cars, as to the fact that they were engaged in interstate commerce. That question is hardly necessary for you to consider or necessary for me to submit to you. There is no dispute about that. Interstate commerce, as you understand, of course, is traffic between one state and another state—shipments from one state to another state. That is interstate traffic.

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## THE UNITED STATES *v.* PACIFIC COAST RAILWAY COMPANY.

(In the District Court of the United States for the Southern District of California.)

[173 Fed. 453. Affirmed, 173 Fed. 448.]

(Syllabus by the court.)

1. Under the Federal Safety Appliance Acts, in order to recover the statutory penalty provided for in section 6 thereof, the United States must prove (1) that the defendant at the times mentioned in the complaint was a common carrier by railroad engaged in interstate commerce; (2) that it hauled, or permitted to be hauled over its line, the locomotives, trains and cars mentioned in the



several counts of the complaint; (3) that the locomotives, trains and cars were not provided with the equipment required by the statute.

2. A shipment from a point without the State of California was consigned to San José, in said State. Before the shipment reached California and while in transit, the consignee, by an agreement with one of the carriers, changed the destination from San José to Ca-reaga. *Held*, That the traffic being carried from San José to Ca-reaga was interstate. *Gulf, Colorado & Santa Fe v. Texas*, 204 U. S., 403, distinguished.

OSCAR LAWLER, *United States attorney*; ALOYSIUS I. McCORMICK, *assistant United States attorney*, and ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

JAMES A. GIBSON and GEORGE W. TOWLE, for defendant.

*Decided June 13, 1908.*

WELLBORN, *District Judge* (charging jury):

There being no conflict whatever in the evidence in this case, the parties have submitted motions respectively for peremptory instructions. Taking them up in the order in which they have been submitted, or in the order in which they were presented, the defendant asks the court to peremptorily instruct the jury to return a verdict in favor of the defendant on all the counts in the complaint. The plaintiff asks that the court peremptorily instruct the jury to return a verdict in its favor on all the counts of the complaint, excepting the eleventh and twenty-third, being duplicates of the ninth and twenty-second counts.

These two motions are the matters which call on me now for immediate disposition, and of course the disposition that I make of these motions will determine the case, because the jury will then be instructed to find or return a verdict in accordance with the conclusions which I announce.

I may say, before taking up the merits of these motions, that it is obvious, not only to the court, but even to a casual

observer of the progress of this trial, that counsel both for the plaintiff and for the defendant have made their researches into the law of the case with great industry, and the presentation of their respective views has been marked by uncommon ability. If I had no jury in the box and could take the case under advisement for the purpose of preparing an opinion, I should like to review these questions for the reasons which I have just indicated; but this is impracticable, and I shall not undertake to do any more than to announce my conclusions, with such reference to the law and the facts in the case as may make the announcement intelligible.

The first Safety Appliance Act was passed in 1893, and this act as amended April 1, 1896, contains, among others, the following provisions, which are applicable to the case at bar. The first section of the original act reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine, in moving interstate traffic, not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it, so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring the brakeman to use the common hand brake for that purpose.

I am reading these various provisions because I think it is well that the jury, as well as counsel, should understand the ruling I am going to make. The second section reads as follows:

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 6, as amended in 1896:

That any such common carrier using any locomotive engine running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a

penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such District Attorney to bring such suits, upon duly verified information being lodged with him of such violations having occurred, etc.

The act was further amended March 2, 1903, and this last amendment provided, among other things, in section 1 of the act that the provisions and requirements of the act entitled "An act to promote the safety of employees and travelers upon railroads, by common carriers engaged in interstate commerce, approved March 2, 1893, and amended April, 1896, shall be held to apply to all common carriers by railroad in the Territories and in the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof, and of said acts, relating to train brakes, automatic couplers, grab irons, and the height of draw bars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of said act of March 2, 1893, as amended by the act of April 1, 1896, or which are used upon street railways."

I am of opinion that that part of the amendatory act of 1903 which provides, "and the provisions and requirements hereof and the said act relating to train brakes, automatic couplers, grab irons, and the height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith," broadens the original act of 1893 so as to make its requirements concerning train brakes, automatic couplers, grab irons, and the height of drawbars apply not only to trains, locomotives,

tenders, and cars employed in the movement of interstate traffic, but to all trains, locomotives, tenders, and cars used on any railroad engaged in interstate commerce. In other words, for the Government to recover under the amendatory act of 1903, it is not necessary, as it was under the original act of 1893, to show that the car with the defective equipment was employed in interstate movement at the time this defect was discovered, but it is only necessary to show that said car was hauled over the line or used by a railroad engaged in interstate commerce. *U. S. v. Chicago, M. & St. P. Ry. Co.*, 149 Fed., 436. The case just cited is the case which was read by Judge Gibson, and which had not been called to my attention previously; but the views which I have announced are in complete accord with the views expressed by Judge McPherson in the case which I have just cited. Unless the amendatory act is so construed, those parts of it last quoted are entirely without effect and useless.

To further illustrate the effect of this amendatory act, I will read the following statement by a Member of the House of Representatives while that body had the act under considerations:

MR. WANGER: Mr. Speaker, the purpose of this act is to make more efficient the provisions of the act of March 2, 1893, for the promotion of the safety of employes upon railways. It has been held by some courts that the tender of a locomotive is not a car, and is therefore not affected by the provisions of the act. It has also been held that the act only applies to cars in interstate movement, and cars are very frequently, although generally designed for and used in the movement of interstate traffic, in use which is not interstate movement that requires the services of operatives upon them. Whenever an action for damages is brought by reason of the death or injury of a railroad employe, of course every defense is made; and, although the car may not be equipped as directed by the act of Congress, yet that direction, as it stands, only applies when the car is being used in the movement of interstate commerce; therefore the burden is on the plaintiff in every such action to establish that fact, and is frequently an impossibility, because frequently the injury or death does not happen when the car is so engaged in interstate commerce.

It is, therefore, of the highest importance to make the act of Congress, as everybody supposed it would be, effective, so far as we have the power and authority, for the protection of employes by requiring the equipment referred to in the act on all cars used on railroads engaged in interstate commerce. That is the purpose of the first section

of the bill. The purpose of the second section is to require a more general and uniform use of air and air brakes, so as to have less need for the operation of hand brakes. The present act, as I recollect it, is that there must be sufficient air-braking apparatus used to enable the engineer to control the train. That, of course, differs, perhaps, in the judgment of every engineer. Therefore it seems appropriate that there should be a certain percentage of the cars of every train required to be operated by air brakes, whether it is actually essential for the proper control of the train or not.

To the same effect, the Interstate Commerce Commission, in its Seventeenth Annual Report, page 84, after the act had become a law:

The necessity of showing that a car was engaged in interstate commerce was another difficulty in the way of enforcing the law. It was necessary to get at the billing showing destination of cars, and to prove in each case that the car complained of was actually moving or used in interstate commerce at the time its defect was discovered. The amendment in question has obviated this difficulty. The law now applies to all equipment on the lines of carriers engaged in interstate commerce, without regard to the service in which it is used.

I am of the opinion that under said acts as above explained there were only three things which the Government must prove in order to recover:

(1) That the defendant, at the times mentioned in the complaint, was a common carrier by railroad, engaged in interstate commerce;

(2) That it hauled, or permitted to be hauled, over its lines the locomotives, trains, and cars mentioned in the several counts of the complaint;

(3) That said trains, locomotives, and cars were not provided with the equipment required by said act.

There is no controversy as to the existence of the second and third ingredients of the plaintiff's causes of action, nor is there any controversy that the defendant was and is a common carrier by railroad. The only issue between the defendant and the plaintiff is as to whether or not the proof shows that it was engaged, at the times mentioned in the complaint, in interstate commerce.

There is no conflict whatever in the evidence relating to



this issue, and from such evidence, following the principles declared in *United States v. Colorado Northwestern R. R. Co.*, 157 Fed., 321, some of which had been previously enunciated in the *Daniel Ball case*, 10 Wall., 557, I am satisfied that the defendant was engaged at the said times in interstate commerce. The letter of January 25 of the consignor, the National Tube Company, to the general freight agent of the Southern Pacific Company, asking that the destination of the shipments therein named be changed on their arrival at the place to which they were originally consigned, and the direction contained in the letter or traingram, signed "J. M. Brewer," of date January 29, written more than a month before either of said shipments arrived at San Jose, and some time before they had even reached California, clearly distinguishes the case from *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, 204 U. S., 403. I may say here that of course the actual physical diversion of the shipments was not and could not have been made until the arrival of the cars at San Jose, or Los Angeles, or Mojave, whichever may have been the destination; but the agreement between the National Tube Company, the consignor, and the Southern Pacific Company, as evidenced by the letters which I have just referred to—and the Southern Pacific Company was one of the carriers who were parties to the contract for the interstate shipment—this agreement between the consignor and the Southern Pacific Company was consummated when the traingram was sent by the Southern Pacific Company pursuant to the request of the National Tube Company, the consignor, to the local agent of the Southern Pacific Company at San Jose. After that order had been sent to the agent at San Jose it was as though the original contract had read that Careaga, or whatever was the point to which it was to be diverted, was the ultimate destination. In other words, the original contract was so changed as to substitute Careaga, or the other points on the defendant's local line, for the points on the Southern

Pacific given in the waybill as it was originally executed. I might say that there is another fact that adds some strength, probably, to this conclusion, although the conclusion would have been reached without it—that the testimony of Mr. Garrett, I think it is, showed that the National Tube Company furnished and provided the local agent at San Jose with money to prepay the transportation beyond that point to the new destination under the diversion order.

Recurring now to the case of *Gulf, Colorado & Santa Fe Railroad Company v. Texas*, 204 U. S., 403, the court, at page 412, said, among other things:

In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana—that is, an interstate shipment. \* \* \* Neither the Harroun nor the Hardin company changed, or offered to change, the contract of shipment or the place of delivery. \* \* \* No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial, so far as the completed transportation was concerned.

It is a fair inference from this quotation that if the original contract of shipment had been changed by the parties so as to substitute Goldthwaite for Texarkana, the decision of the court would have been different; and I am of opinion that the changes of destination shown in the case at bar by the letters above mentioned are the situations which, it is to be inferred from the language of the Supreme Court in the case last cited, would have made the transportation there involved an interstate matter and, in my opinion, bring the case at bar fully within *United States v. Colorado Northwestern R. R. Co., supra*.

From the views above expressed as to the law of the case, there being no conflict in the evidence relating to the facts, it follows that the defendant's motion must be denied, and the plaintiff's motion for peremptory instructions must be allowed, and orders to that effect will be accordingly entered.

UNITED STATES *v.* WHEELING AND LAKE ERIE  
RAILROAD COMPANY.

(In the District Court of the United States for the Northern District  
of Ohio.)

[167 Fed. 198.]

*Decided June 16, 1908.*

(Syllabus by the court.)

1. The Safety Appliance Act of March 2, 1903, amending the act of March 2, 1893, as amended April 1, 1896, is constitutional and valid. Employers' Liability cases (207 U. S. 463), distinguished.
2. All the cars used by a railroad engaged in interstate commerce in the natural course of their use are instrumentalities of interstate commerce; whether they carry interstate traffic themselves or are hauled in a train which contains interstate traffic, such cars are impressed with an interstate character.
3. In order effectively to protect the employe engaged in handling a car loaded with interstate traffic, Congress lawfully may regulate the appliances used on every car upon which such employe is employed.
4. It is not necessary that the petition in an action to recover the statutory penalty under the Safety Appliance Act allege that the defect in the car was due to any want of ordinary care upon the part of the defendant. (*Railway Co. v. Taylor, Admx.*, 210 U. S. 281.)
5. If a car is one that is regularly used in the movement of interstate traffic, and is at the time involved in the movement of a train containing interstate traffic, the lading of the car is wholly immaterial.

*William L. Day*, United States attorney; *Thomas H. Garry*, assistant United States attorney; and *Luther M. Walter*, special assistant United States attorney, for the United States.

*Squire, Sanders & Dempsey*, for defendant.

## OPINION ON DEMURRER TO PETITION.

TAYLER, *D. J.*:

The petition in this case, in twenty-three causes of action, seeks to recover from the defendant penalties for alleged failures to equip certain cars with couplings and grab irons, as required by what is known as the safety appliance act.

The jurisdictional facts alleged in order to bring the cars referred to within the embrace of the Federal act are:

1. That the car was itself at the time used in interstate commerce, being loaded with some kind of freight originating outside of the State of Ohio, and being carried within it or being destined to some point outside of the State; or

2. That it was a car which, being one regularly used in the movement of interstate commerce, was, at the time of the violation, being hauled in a train containing interstate commerce, one car in the train with it, as, for example, Illinois Central 35572, containing baled hay consigned to a point within the State of West Virginia.

In the counts referred to by this second proposition some of the cars are described as being empty and some as being loaded, but it is not charged that the loaded cars contained interstate traffic. I see no distinction, so far as this case is concerned, between the two.

It is objected—

1. That the act is unconstitutional under the rule laid down in the Employers' Liability cases, 207 U. S., 463.

2. That, assuming that the cars were originally provided with the safety appliances which the law requires, it does not appear that the condition in which they were at the times named in the petition respectively, was due to any want of ordinary care.

3. That in the case of empty cars, or cars not loaded with interstate commerce, it does not appear that they were, at the time of the existence of the defects, being used in interstate commerce.

These objections will be taken up in their order:

The law was originally passed March 2, 1893, and, with an amendment or two later adopted and unimportant, so far as this question is concerned, an amendment was passed on the 2d of March, 1903, which provided that the act of 1893, with its amendments, should "be held to apply to common carriers by railroads in the territories and the District of

Columbia, and shall apply in all cases whether or not the couplers brought together are of the same kind, make, or type," and "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

It is claimed that since the act of 1903 undertakes to make the act of 1893 apply to trains, locomotives, and so forth, used on any railroad engaged in interstate commerce, it extends the operation of the act to subjects over which Congress has no control, and that this is exactly the effect of the decision of the Supreme Court in the Employers' Liability cases.

Many answers suggest themselves to this claim. If the act of 1903 had been incorporated in the original act of 1893, and if it be true that the scope which the act covered was larger than that which Congress had power to legislate upon, and in consequence of that, the act should be held unconstitutional because of the impossibility of separation of the unconstitutional part from the constitutional part, still the contention of counsel would not be effective in this case.

We have here the act of 1893 in full force and effect, with its provisions in no wise diminished or curtailed by the act of 1903. That the act of 1903 is, as the Supreme Court of the United States declared in *Johnson v. Railroad Company*, 196 U. S., 1, affirmative and declaratory, and, in effect, only construes and applies the former act. Now, if the former act is construed and applied by a later act (which, of course, involves the proposition that it remains unrepealed) and the later act is unconstitutional, in that it undertakes to give the former act a wider application than Congress had power to give to it, by what sort of reasoning can it be contended that the former act falls to the ground because it has had plastered upon it by Congress an unconstitutional construction and application? The mere statement of this proposition carries with it its answer and exhibits its unreasonableness.

But much more may be said in favor of the propriety of



this legislation, having in view the decision of the Supreme Court in the Employers' Liability cases. It is true that the Supreme Court in that case held the Employers' Liability act unconstitutional, because it made the railroad company liable to any of its employes, without restricting the liability to those who were engaged in interstate commerce; but a parity of reasoning would not require that we should say the same thing of the Safety Appliance act because it refers to all cars used on any railroad engaged in interstate commerce. It seems to me that, in the respect complained of, there is no analogy between the decision of the Supreme Court in the Employers' Liability cases and the theory of the defendant's counsel as to the constitutionality of the Safety Appliance act. An employe of a railroad company engaged in interstate commerce does not, merely because he is such employe, sustain the same relation to interstate commerce as a car used on a railroad engaged in interstate commerce sustains to interstate commerce on that road. Certainly, the Federal Government owes no duty to, and has no authority over, an employe of a railroad which is engaged in interstate commerce, if the employe himself is not engaged in the work of interstate commerce. That employe is subject, in respect to his relations with the railroad company, to the laws of the State in which the service is performed. There is no reason why the power of the State should not be sufficient for his protection, or why the Federal Government should interfere with respect to that or any other matter relating to that employe in respect to his work with the railroad company, so long as it does not relate to the interstate commerce of the company.

But this is not true of a car used by a railroad engaged in interstate commerce. All of the cars used by a railroad engaged in interstate commerce, in the natural course of their use, are instrumentalities of interstate commerce; whether they carry interstate traffic themselves or are hauled in a train which contains interstate traffic the effect is the same.

They stand in a certain and important relation to that interstate commerce over which Congress has control; and it is quite apparent that Congress, in undertaking to determine the manner in which interstate commerce shall be carried on, and especially in making effective the useful and beneficent purpose of providing for the safety of employes, would necessarily have a regard for the cars which the interstate commerce railroad had in use. And thus, discovering a very marked and practical distinction between a car used by an interstate commerce railroad and a person in the employ of an interstate commerce railroad, we see how one, in the nature of things, becomes properly the subject of Federal legislation while the other, depending upon the character of his work, may or may not become properly the subject of Federal legislation. This proposition is amplified in the reply herein made to the third objection to the applicability of the act.

After all, on this subject of the constitutionality of the act, it seems to me that that question has been fully answered by the determination of the Supreme Court in *Johnson v. Railroad Company*, *supra*, wherein it is declared that this act of 1903 only construes and applies the act of 1893, and does not add any new affirmative provision.

As to the second objection, whatever may be the right of the railroad company to defend against the claim made in a suit of this kind by saying that the coupling became defective or the grabiron lost so recently before the time named in the petition as to make it impossible, in the exercise of ordinary care, to replace or repair, that is purely a matter of defense if it ever can be asserted at all. It can not be urged in support of a demurrer to the cause of action. If it were not so, it would be practically impossible for proof to be made in any case of a violation of the law. There are approximately 2,000,000 cars in use by railroads in this country, and if the contention referred to is sound, it would be necessary, in order to sustain a cause of action in cases under this act, that proof be made that the appliance was in a condition of

unrepair at one time, that it continued to be in that condition of unrepair or in a developing condition of greater unrepair up to another time, the lapse of the intervening time being so great as to show a want of ordinary care on the part of the railroad company. In the meantime the very thing to prevent which the law was passed might occur, to-wit, the injury of an employee. The practical administration of justice would be denied and the real enforcement of the law be impossible if the construction contended for was sound.

But it has been held in several cases that even as a defense on the merits no degree of care, no absence of negligence, can excuse for the failure to perform a duty unqualifiedly imposed by statute. And in the recent case of *Railway Company v. Taylor, Admx.*, decided May 18 of the present year by the Supreme Court, the court very pointedly lays the unqualified responsibility upon the railroad for such a condition of unrepair.

As to the third objection. What shall we do in the case of a car which is regularly used in the movement of interstate traffic but at the time when the defect is known to exist is itself not being used for carrying interstate commerce, but is being hauled in a train containing a car loaded with interstate commerce? What is the purpose of the law? Here is a train which is engaged—at least part of it—in interstate commerce, and so long as that is true every car in the train is impressed, so far as the requirements of this act are concerned, with an interstate character. It is a part of the current. The interstate car can not move except with relation to the empty car. The empty car may at any moment be coupled to the interstate car. A brakeman engaged in performing some duty in respect to the interstate car may be compelled to pass over or use a grabiron on the empty car or couple the empty car to the interstate car. Endless confusion would arise if any distinction was made under such conditions between a car loaded with interstate traffic and an empty car regularly used in the movement of interstate traffic, but at the time unloaded and coupled to another

car actually in use in the movement of interstate traffic. Of course the same thing must be said of the loaded car, whatever the character of the freight it carried, if it is a car regularly used in the movement of interstate traffic.

It seems to me that from every point of view the objections raised to the several causes of action are not well grounded. The demurrer is overruled.

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U. S. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY  
COMPANY.

(In the District Court of the United States for the Fourth District of  
Arizona.)

*Decided July 17, 1908.*

(Syllabus by the court.)

1. The height of drawbars of freight cars as required by the Federal Safety Appliance Act shall not be more than  $34\frac{1}{2}$  inches nor less than  $31\frac{1}{2}$  inches, from the top of the rail, the rail being on the same level as the cars equipped with such drawbars.
2. In prosecutions to recover the penalty under said act the burden is on the Government to show by a clear preponderance of evidence the facts as alleged in the petition.
3. A failure on the part of the inspectors for the railroad company to discover defects in the equipment of cars cannot excuse the company from liability under the statute.
4. The inspectors for the Government are not required to notify the employees of the railroad company of defects on cars.
5. Nothing but inability on the part of the common carrier to comply with the requirements of the Safety Appliance statute will excuse its non-compliance. The question as to whether it is convenient for a repair to be made at a certain place does not arise.
6. If a drawbar of a car be pulled out en route it is the duty of the carrier to make the necessary repairs at the nearest point where such repair can be made, and the hauling of such car in such defective condition beyond this point is a violation of the law.
7. If for any cause a part of the coupling or uncoupling mechanism of a car be removed, broken, or parts being present and not connected,

- thereby rendering it such that it can not be operated without the necessity of a man going between the ends of the cars, then such car is not equipped in compliance with the law.
8. The law requires that both ends of each car be equipped as required by the statute.
  9. The statute applies to empty cars as well as to loaded cars.
  10. In a prosecution to recover the penalty for the violation of the statute within a Territory of the United States, it is not necessary to show that the defendant is engaged in interstate commerce; neither is it necessary to show that the car itself is engaged in interstate traffic.
  11. To constitute a compliance with the law it is not sufficient that the coupling or uncoupling apparatus may be operated with great effort without going between the ends of the cars, but it must be in such condition that it can be operated by the use of reasonable effort.
  12. Positive testimony is to be preferred to negative testimony in the absence of other testimony or evidence corroborating the one or the other.

*Joseph L. B. Alexander*, United States attorney; *Roscoe F. Walter*, special assistant United States attorney. for the United States.

*Paul Burkes* for defendant.

#### INSTRUCTIONS TO JURY.

SLOAN, *District Judge* (charging jury):

This suit is brought under the provisions of the Congressional act of March 2, 1893, as amended by the law of 1896 and by the law of 1903, which act and the said amendments are known as the Safety Appliance acts. Under section 2 of the act it is made the duty of common carriers engaged in interstate commerce, and also common carriers within the Territories of Arizona and New Mexico, to equip their cars with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. The act also provides that it shall be unlawful for any such common carrier to use any freight car equipped with a drawbar which, measuring perpendicularly



from the level of the tops of the rails to the center of such drawbar, shall not be more than  $34\frac{1}{2}$  inches in height or less than  $31\frac{1}{2}$  inches in height; it being assumed in such measurement that the rails are on the same level as the car equipped with such drawbar.

It is further provided that any violation of either of the provisions of the statute which I have called your attention to renders such common carrier liable to a penalty of \$100 for each and every such violation, to be recovered in a suit or suits brought by the United States in a court having jurisdiction under the act.

The complaint in this case contains fifteen distinct counts or causes of action. The first and the tenth counts relate to alleged violations by defendant of the provision of law with reference to the height of drawbars, it being alleged in each of these counts that the defendant company used a freight car with a drawbar which was less than  $31\frac{1}{2}$  inches in height, measured perpendicularly from the level of the tops of the rails to the center of such drawbar. Counts 2 to 9, inclusive, and 11 to 15, both inclusive, relate to alleged defects in the couplers with which the various cars named in the counts were equipped, it being charged that each was defective in that it could not be operated so as to uncouple the car to which it was attached without the necessity of a man or men going between the ends of such car and that to which it might be coupled.

The burden is upon the plaintiff in this cause to show by a clear preponderance of the evidence that the defects in safety appliances alleged to have existed as set out in the complaint did actually exist and the existence of such defects must be established by a fair preponderance of the evidence.

The burden is laid upon the defendant, under the statute, to discover defects in the appliances mentioned under the act, whenever an opportunity is fairly presented for the discovery of such defects. Any failure or omission on the part of the inspectors of the company to discover such defects,

after such opportunity is presented, can not excuse the company from liability under the statute.

The inspectors for the Government are not required to notify the employes of the railroad company of existing defects previous to or at the time of movement of defective cars, though such inspectors previously discovered such defects.

I charge you that the law requires a strict compliance on the part of common carriers with the provisions of the Safety Appliance act to which I have called your attention. Nothing but inability on the part of a common carrier to comply with the requirements of the act will excuse its non-compliance.

I charge you further that in the case of a car which may have its drawbar pulled out en route, it is the duty of the common carrier to make the necessary repair at the nearest point where such repair can be made. It may haul such car to such nearest point and no farther, using such care and caution as may be needed to insure the highest degree of safety and security while being so hauled. The common carrier may not choose its place to make such repair, but must avail itself, for that purpose, of the nearest point where, by the exercise of diligence and foresight, the company may prepare to make such repair. Inasmuch as inability alone will excuse the common carrier from a literal compliance with the act, it is the duty of the common carrier to have the material and facilities on hand at each repair point which may be needed to make repairs of the kind necessary to comply with the requirements of the Safety Appliance acts. It is the duty of the common carrier to use reasonable foresight in providing material and facilities for such purpose. In such a case it is not a matter of convenience merely, but a question of ability on the part of the common carrier to comply with the act.

In this case the jury is instructed that the defendant company can not excuse, under the Safety Appliance act, the hauling of a car which was without its drawbar from Winslow

to some other point for repairs if it could have been within the power of the defendant company, had it exercised reasonable care and foresight, to have repaired it at Winslow, it being charged, as I have said before, with the duty of having on hand at said repair point the material and facilities needed for that purpose.

It is a violation of law rendering the common carrier liable under the statute to use a car with the clevis pin of the chain connecting the lock block to the uncoupling lever broken or removed for any cause, when the effect would be to render the uncoupling mechanism inoperative without the necessity of a man going between the ends of the cars.

If it appear that the coupler be present but the parts are not so connected that the coupler can be operated without the necessity of a man or men going between the ends of the cars, then it is not a compliance with the statute.

You are also instructed that it is not sufficient that one end of each car be equipped as required by the statute, but both ends must be so equipped that the coupling or uncoupling mechanism of each car may be operative in itself without requiring the manipulation of the device on the adjacent car to effect a coupling or uncoupling to or from such adjacent car.

It is not necessary that any car in question be a loaded car to come within the meaning of the statute. If the car is hauled in the defective condition, the statute is violated regardless of the fact whether the car be loaded or unloaded. Neither is it necessary, in the case of a prosecution to recover the penalty for a violation that occurs within this Territory, that the car be engaged in interstate traffic. It is sufficient under section 1 of the amendment of 1903, if the defective car be hauled by a common carrier within the Territory, even though the carrier be not engaged in interstate commerce, provided the car does not come within the exceptions embraced in section 6 of the original act as amended April 1, 1896, or is not used upon a street railway.

You are instructed that if the Government has clearly and satisfactorily shown by the evidence that the car, as alleged in the first count of the Government's petition, was equipped with a drawbar which, measured perpendicularly from the level of the tops of the rails to the center of such drawbar, was less than  $31\frac{1}{2}$  inches in height, as required by section 5 of the Federal Safety Appliance act, approved March 2, 1893, as amended April 1, 1896 and March 2, 1903, then you will find the defendant guilty on such count. And so it is with reference to count 10 of the Government's petition.

You are also instructed that if the Government has clearly and satisfactorily shown by the evidence that the car, as alleged in count 2 of the Government's petition, was not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man or men going between the ends of the cars, then you will find the defendant guilty on that count. And the same with respect to counts 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, and 15 of the Government's petition.

On the other hand, if you fail to find clearly and satisfactorily from the evidence that as to any of these counts there was a violation of the requirements of the statute, then as to such count or counts you will find the defendant not guilty.

The court instructs you that if you find from the evidence that the absence of the "keeper" did not destroy the automatic action of the coupler on cars AT96348, 96294, and 96260, as set out in the fifth, sixth, and seventh counts respectively of plaintiff's complaint, but that such couplers could by the use of reasonable effort have been uncoupled by use of the lever of their own mechanism without the necessity of a man going between the cars, notwithstanding the absence of the "keeper," then you must find for the defendant on the fifth, sixth, and seventh counts.

In considering the testimony of the witnesses who have testified before you, you have a right to weigh, in making up

your judgment, the testimony of any witness, but in doing this you will not give either more or less weight to the testimony of any witness because of the fact that such witness testifies on behalf of the Government or because of the fact that such witness testifies on behalf of the railroad company. But you will give to the testimony of each witness that weight which, in your judgment, it is entitled to from all the facts and circumstances in the case.

In this connection it is proper to state that positive testimony is to be preferred to negative testimony, other things being equal; that is to say, when a credible witness testifies to having observed a fact at a particular time and place and another equally credible witness testifies to having failed to observe the same fact with the same or equal opportunity to so observe such fact, the positive declaration is to be preferred to the negative in the absence of other testimony or evidence corroborating the one or the other.

You are instructed that if you believe, from a consideration of all of the testimony in the case, that any witness has willfully testified falsely as to any material fact, then you are at liberty to disregard the whole of his testimony, except in so far as the testimony of such witness may be corroborated by other credible evidence in the case.

The court instructs you that by a preponderance of the evidence is not meant the testimony of the greater number of witnesses, but rather the greater weight of credible testimony as determined by the character of the testimony of the various witnesses and the respective means and opportunities such witnesses may have had of acquiring information and knowledge and of seeing or knowing and remembering that to which they testify, the probability of its truth, their interest, if any, whether as parties or witnesses in the result of the action, and also their manner of testifying, and every other fact which will enable you to determine the weight and credibility to be given to their testimony.

If you find the defendant guilty, you will say: "We, the



jury, find the defendant guilty on the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth counts of the petition."

You may find the defendant guilty on some of the counts and not guilty on the others. In that case the form of your verdict will be: "We, the jury, find the defendant guilty" on whatever number of counts you do find the defendant guilty, and "not guilty" on whatever you find the defendant not guilty.

If you find the defendant not guilty, you will say: "We, the jury, find the defendant not guilty."

Verdict of guilty on all counts.

United States Circuit Court of Appeals, Seventh Circuit.  
No. 1475.—October term, A. D. 1908.

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BELT RAILWAY COMPANY OF CHICAGO, PLAINTIFF IN ERROR, *v.* UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

[168 Fed. 542.]

In error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

*Decided February 3, 1909.*

A belt-line railway company, operating a line lying wholly within a city, county, or State, while moving a commodity originating at a point in one State and destined to a point in another State, is engaged in interstate commerce by railroad, and as such is within the Federal Safety Appliance Acts.

*William J. Henley, William L. Reed, and Francis Adams, Jr.,* for plaintiff in error.

*Edwin W. Sims,* United States attorney; *Harry A. Parkin,* assistant United States attorney; and *Philip J. Doherty* and

*Luther M. Walter*, special assistant United States attorneys,  
for defendant in error.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges:

OPINION OF THE COURT.

BAKER, *Circuit Judge*, delivered the opinion of the court:

The writ is addressed to a judgment assessing a penalty against plaintiff in error for an alleged violation of the provisions of the Safety Appliance acts in relation to power brakes. 27 Stat. L. 531, 29 Stat. L. 85, 32 Stat. L. 943. Certain questions relating to the purpose, scope, and validity of this legislation are considered in *Wabash R. Co. v. U. S.* and *Elgin, etc., R. Co. v. U. S.*, herewith decided.

The only assignments presented and discussed by plaintiff in error are that the court erred in refusing to direct a verdict of not guilty, and in giving the following instruction: "The question therefore presents itself, and it is a legal question, Was the Belt Company, at the time it moved this string of 42 freight cars, containing a car originating in Illinois and destined to Wisconsin, engaged in interstate commerce? I charge you that when a commodity originating at a point in one State and destined to a point in another State is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination. If, between the point of origin of this commodity and the point of destination of this commodity, the car in which it is being vehieled from origin to destination passes over a line of track wholly within a city, within a county, or within a State, the railway company operating that line of track while moving this commodity, so originating and destined from one point to another point, intrastate, is engaged in interstate commerce."

Was there sufficient evidence to warrant the jury in finding

that in hauling the train in question plaintiff in error as a common carrier was "engaged in interstate commerce by railroad?"

The railroad tracks of plaintiff in error lie wholly within Cook County, Ill. There are 21 miles of main line and about 90 miles of switching and transfer tracks. The main line constitutes a belt that intersects the trunk lines leading into Chicago. By leads and Ys direct physical connection with the trunk lines is maintained. Plaintiff in error's business consists in transporting cars between industries located along its line, between industries and trunk lines, and between trunk lines. The first two kinds need not be noticed as the transportation here involved was between trunk lines. The train in question contained among others a car laden with lumber, and consigned from a point in Illinois on the Chicago & Eastern Illinois to a point in Wisconsin on the Chicago & Northwestern. This car was taken by the plaintiff in error from the tracks of the Eastern Illinois over the belt line and put on the tracks of the Northwestern. For services of this kind plaintiff in error makes arbitrary charges of so much a car, which are collected monthly from the railroad companies for which the services are rendered. In such operations plaintiff in error has no dealings with the shippers and pays no attention to the class of traffic. Its relation to the traffic was stated by the general superintendent, as follows: "The Belt Company acts practically as an agent for the trunk lines in the handling of cars from one connection to another through its yards."

In *United States v. Geddes*, 131 Fed. Rep., 452, defendant as receiver was operating a narrow gauge railroad that lay wholly in Ohio. "At Bellaire it connected with the Baltimore & Ohio road, in the sense that it received from the Baltimore & Ohio freight from other States marked for points on its line, and delivered to the Baltimore & Ohio freight from points on its line marked for other States, in the following manner: There was no interchange or common use of cars,

the gauges of the two roads being different. The cars of the defendant road were used only on its own line. But a transfer track ran from the main line of the Baltimore & Ohio to the terminal station of the defendant road, so that the freight cars of the two roads could be placed alongside adjoining platforms and the transfer of freight made by the use of trucks handled by the Baltimore & Ohio men. No through bills of lading for such freight were issued by either road, no through rate was fixed by mutual arrangement, and no conventional division of a through freight charge was made." The Circuit Court of Appeals for the Sixth Circuit decided that the narrow gauge cars in question were not subject to the Safety Appliance act, holding that a common carrier was not "engaged in interstate commerce by railroad" within the meaning of the Safety Appliance act unless, referring to the definition in the original interstate commerce act, it was "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous carriage or shipment," from one State to another. The equipment of a narrow gauge railroad which lay wholly in Colorado and which was similarly endeavoring to conduct a separate and independent business, was held by the Circuit Court of Appeals for the Eighth Circuit to be within the Safety Appliance act. *U. S. v. Colorado, etc., R. Co.*, 157 Fed. Rep., 321.

Plaintiff in error argues the present case as if the judgment could not properly be affirmed without our adopting the decision in the eighth circuit as against that in the sixth. In our judgment the question presented to those courts is excluded from our consideration by certain distinguishing and controlling facts. The narrow gauge track had no direct physical connection with the broad gauge tracks of the interstate trunk lines, and so no cars from other States, laden with goods from other States, were hauled on the local highway. The Belt Line physically connected its track with those of the

Eastern Illinois and of the Northwestern, so that a continuous highway across State lines was formed, on which interstate traffic, loaded on interstate cars, was moved from origin to destination without change of cars. The narrow gauge road, by limiting its bills of lading to points on its own line, endeavored to escape being held a common carrier engaged in interstate transportation. The Belt Line, issuing no bills of lading because of having no dealings with the shipper or with anyone on his behalf, performing its gateway service on account of and as agent of the trunk lines, made its track the track of its principals. Consequently the character of the transportation should be determined by considering the transportation as the act of such principals. Trunk-line yards are in some instances so related to each other that through cars can be transferred without the intervention of a go-between. We are of opinion that the transportation in question was the same in legal effect as if the Eastern Illinois by means of its own locomotive and track had put the through car on the Northwestern's track. In this view there was evidence from which the inference of fact might warrantably be drawn by the jury that there was a common arrangement for a continuous carriage over the Eastern Illinois and the Northwestern; and so, with respect to the movement in question, plaintiff in error was engaged in interstate transportation.

When the portion of the charge complained of is read in the light of the undisputed facts, we see no basis for saying that the substantial rights of plaintiff in error were injuriously affected.

The judgment is affirmed.

SEAMAN, *Circuit Judge*, dissenting:

I can not concur in the affirmance of this judgment, as I believe the operation of the Belt Company described in the record is not within the meaning of the Safety Appliance act. It clearly appears that this company was an independent railroad within the city, engaged only in transferring cars



(loaded or unloaded) from the terminal of one trunk line in Chicago to that of another trunk line; that it had no part in the shipment of any commodities which were upon the cars, nor interest in shipping bills or rates charged, nor concern in their ultimate destination and delivery to consignee; that its only service involved herein was the transfer of cars over its own lines, from one terminal to the other in Chicago, when the cars were delivered to it by a trunk line to be so transferred, for which service the Belt Company was paid by the trunk line an arbitrary rate per car, on monthly collections. In such service the Belt Company is neither chargeable with notice whether the service of the trunk lines in respect of the cars is interstate commerce or otherwise, nor concerned in such inquiry, as I believe. It was not "engaged in interstate commerce," as defined in the interstate commerce act, and I am of opinion that the two acts are in *pari materia*, so that the terms of the Safety Appliance act are inapplicable to the service thus performed by the Belt Company, and the judgment should be reversed.

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THE UNITED STATES *v.* LEHIGH VALLEY RAIL-  
ROAD COMPANY.

[160 Fed. 696.]

(Motion for new trial reported at 162 Fed. Rep. 410.)

In the District Court of the United States for the Eastern District of  
Pennsylvania.

December Term, 1906.

(Decided March 17, 1908.)

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.

The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.

In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition.

Where a car, which had been at rest at a station for a period of time, is taken out upon the road in a defective condition, the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

#### STATEMENT OF FACTS.

This is an action brought by the United States to recover the statutory penalty of \$100 under the Safety Appliance act.

Two inspectors of the Interstate Commerce Commission found Philadelphia & Reading car No. 46247, November 12, 1906, at Allentown, Pa., in the yard known as the East Penn Junction yard, with the lever disconnected from the lock pin or lock block on each end of the car. The car was first inspected at 2:50 p. m.; it left East Penn Junction at 8:30 p. m. for Cementon, Pa., a few miles away, and was found there the next day in the same defective condition. Defendant's employes testified that a defect had existed at East Penn Junction on the 12th, but defendant contended that, as the repairs were generally made when found, the car did not leave for Cementon in a defective condition.

*J. Whitaker Thompson*, United States attorney; *John C. Swartley*, assistant United States attorney; *Luther M. Walter*, special assistant United States attorney, for plaintiff.

*J. Wilson Bayard, Esq.*, for the defendant.

Hon. JOHN B. McPHERSON, *Judge* (charging jury):

Gentlemen of the jury: The question that has been submitted to you, the question of fact that has been argued to you, is one that has not appeared in the other cases that perhaps may have been tried in the hearing of some of you. The defendant contends here that the Government has not offered

sufficient evidence to satisfy you that this car was hauled in a defective condition from East Penn Junction to Cementon, to which the load which it carried was bound, and that is the question of fact for you to determine in this case. This Safety Appliance act, the particular section with which we are concerned, makes it unlawful for a common carrier, such as the Lehigh Valley Railroad Company, to haul or permit to be hauled or used on its line any car used in moving interstate traffic not properly equipped with automatic couplers. In this case the question is whether or not this car was moved from East Penn Junction to Cementon by the Lehigh Valley Railroad Company in a condition that was not such as is provided for by this statute, and the duty is upon the Government to satisfy you upon that subject. The burden of proof rests upon the Government in this case to establish to you by clear and satisfactory testimony that that fact existed. It is not a criminal case. We are not trying an indictment. We are trying a suit for a penalty, a suit for a penalty of \$100, for an alleged non-compliance with this Safety Appliance act, and the burden of proof rests upon the Government to make out its case by clear and satisfactory testimony. I repeat, the burden of proof is upon it, and the burden continues to be upon it throughout the case. It is not required to furnish evidence beyond a reasonable doubt, but it is required to furnish clear and satisfactory evidence of all the facts necessary to make out its case. The act requires couplers at both ends of the car that shall couple automatically by impact, and couplers that may be uncoupled without the necessity of going between the cars; this requires that there shall be levers, either a lever going entirely across the end of the car, or a lever upon one side, which operates the mechanism of the coupler so that it may be separated from the other car without the necessity of anybody going between. And it is necessary, to comply with the statute, that the coupler at each end of the car shall be in operative condition. That duty is imposed upon any carrier using a car that is engaged in interstate traffic.

That particular point of time to which your attention is

directed is the 12th day of November, 1906, and the particular place is East Penn Junction in this State, and from there to Cementon, a few miles away, and the charge is that a particular car was defectively equipped. That it was defectively equipped seems to be conceded, as I understand, by the defendant in this case; that is, that one or both couplers were out of order. Testimony has been given by the defendant's witnesses to that effect, as I understand it, but the averment of the defendant is that that defect was remedied and that there is no evidence from which the jury may properly infer that the car was actually moved in a defective condition. It is necessary that the Government shall establish, as I have said to you, by clear and satisfactory evidence that the car was so moved, because it is quite clear that so long as a car, no matter how defectively equipped it may be, remains at rest, it does no harm and can not do any harm, and does not offend against the statute. It is when it is actually in motion and therefore capable of doing harm to the operatives upon the train that the act applies, and therefore it is necessary, and it is the vital question of fact in the case, to establish as to whether or not while this car was being moved it was in a defective condition. Therefore I submit those questions of fact to you for your determination. Did the Lehigh Valley Railroad transport or haul this car from East Penn Junction to Cementon, and if they did, during that period was it defectively equipped?

I have not heard any argument made to you with regard to the question of reasonable care and diligence. The question is, however, raised by one of the points that is presented to me by the defendant, and therefore I say to you in a word that the question of reasonable care and diligence that may have been exercised by the defendant is not a matter for your consideration. As I understand this statute, the railroad company is bound to discover defects if they exist, under the circumstances as they have been offered to us upon this trial. I am not dealing with anything except the facts that are now before us. Here is a case in which this car has been shown to

have been at rest at East Penn Junction for a number of hours, and therefore when there was an opportunity to inspect upon the part of the railroad company. Now, under such circumstances, my reading of the statute is that it imposes upon the company the duty to find the defects if defects exist, and that it must find them at its peril. If its inspectors failed to find them, then the liability for the penalty exists if the car is afterwards moved without having the defects repaired. That, as I understand, is the case for your determination. If you are not satisfied from all the evidence in the case that the Government has by clear and satisfactory evidence made out that this car was hauled in a defective condition between East Penn Junction and Cementon, then you ought to find in favor of the defendant. If they have satisfied you that this car was so defective at the time when it left East Penn Junction that it could not be automatically coupled and could not be uncoupled without the necessity of somebody going between the cars to perform that operation, then your verdict ought to be in favor of the United States for the sum of \$100.

Verdict for the Government.

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THE UNITED STATES *v.* PHILADELPHIA AND  
READING RAILWAY COMPANY.

[160 Fed. 696.]

(Motion for new trial reported at 162 Fed. Rep. 405.)

In the District Court of the United States for the Eastern District of  
Pennsylvania.

December Term, 1906.

*Decided March 17, 1908.*

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.



3. The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.
4. In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition.
5. Where a car, which had been at rest at a station for a period of time, is taken out upon the road in a defective condition, the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

## STATEMENT OF FACTS.

This was an action brought by the United States to recover three penalties of \$100 each alleged to have been incurred by the defendant in hauling on November 12, 1906, Lehigh Valley car No. 83759, November 13, 1906, Lehigh Valley car No. 69609, and on September 26, 1906, its own No. 49786, from Allentown, Pa., with the coupling and uncoupling apparatus on one end of each car in a defective condition, in that the lock pin or lock block was disconnected from the uncoupling lever. Two Government inspectors of safety appliances found these cars in the defendant's yard at Allentown and after at least half an hour's interval the defendant hauled the cars in the defective condition. The defendant offered evidence that in the ordinary course of its business it had inspectors whose duty it was to inspect cars moved by it and if any defects were found such defects were noted in an inspection book kept for that purpose; that it had examined these books and found no entry of any defect having been found or repaired.

J. WHITAKER THOMPSON, *United States attorney*; JOHN C. SWARTLEY, *assistant United States attorney*; LUTHER M. WALTER, *special assistant United States attorney* for plaintiff.

JAMES F. CAMPBELL, ESQ., for defendant.

Hon. JOHN B. MCPHERSON, *Judge* (charging jury):

Gentlemen of the jury: This is an action brought by the United States, as no doubt you understand, to recover the

sum of \$300, being a penalty of \$100 for the use by the defendant company of each of three cars, which it is said were defectively equipped in violation of the act of Congress which is ordinarily known as the Safety Appliance Act. There is only one portion of it to which your attention need be directed, and that is the second section of the act, which provides, in substance, that no common carrier may haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. The meaning of that section is clear enough. The direction of Congress is, that any common carrier, such as a railroad, must equip its cars so that there shall be at both ends a coupler which will couple automatically by impact when it comes in contact with another car, and which may be uncoupled also from the side without the necessity of a man going between the ends of the two cars in order to perform that operation. That requires that each car taken separately shall be complete, completely equipped; that is to say, it requires that the couplers at both ends shall be in good order.

It is not sufficient, under this act of Congress, that one coupler should be in good order and the other should be defective, although it appears from the testimony in the case that under certain circumstances even if one of the couplers is defective the process of coupling may nevertheless take place, provided the coupler upon the car with which the defective car comes in contact is in good order. If the two ends that come together were both out of order, then the coupling could not take place automatically, but if one of them is in good order while the other is not, then, under certain circumstances, the coupling may take place automatically just the same as though both cars were thoroughly equipped. But, however that may be, the act of Congress does not permit such a situation to exist. It requires that each car taken by itself shall have the couplers at both ends in good

order, so that at each end the coupler may perform its service in the manner directed by this statute—that is to say, automatically by the impact of the two cars. And it also requires that the couplers shall be in such order that the cars may be uncoupled without the necessity of somebody going between the cars; that is done by the use of levers. In some instances the lever comes entirely across the ends of the car, so that at whichever side the brakeman or employee happens to be standing he may perform whatever operation is necessary for the purpose of uncoupling. On some of the cars, perhaps the most of them, as the testimony would seem to indicate, I believe it is only upon one side, and then, of course, they can only be used from that side, but nevertheless they can be so used. That is the provision of the statute.

Of course, you will see at once—perhaps you have seen already, if you have been thinking at all about the case—that some difficult questions might arise as to when common carriers might be liable, and it is very easy to conceive of situations in which it would be hard to hold them liable under the strict letter of the law. For example, suppose a car started from the point of shipment in perfectly good order, and then through no fault of the carrier something happened to the coupler while the journey was in progress. Of course, under the strict letter of the law every minute the car was in use after that time there would be a violation of the law; but, I say, that would present a hard case, and if the carrier, under the proper construction of this statute, is liable under such circumstances, of course, there is a certain hardship about the situation. But we have nothing to do with a case of that kind. That may safely be left to be dealt with when the time comes. I give you that as an illustration, and others might be easily thought of. We are dealing with the particular situation disclosed by the evidence, and the jury must confine itself to that, as I intend to do in what I have to say to you.

Here is a case where a certain number of cars, constituting

a train used in interstate traffic—and about that matter there is no controversy—are at rest for a certain length of time; in all cases for more than an hour, in some cases for, I think, several hours; but, at all events, in all of these three cases at rest for more than an hour, and therefore affording an opportunity for inspection for the discovery of defects in these automatic couplers. In a case like that I instruct you that it is the carrier's duty to find any defects that may exist, and if the carrier fails to find them, then the carrier is liable for the penalty imposed by the statute; because if the train is used afterwards with the coupler out of order, then, of course, under the precise letter of the statute, the carrier is using a coupler that can not be coupled automatically by impact or can not be uncoupled without somebody going between the cars, or perhaps neither operation can be performed as the statute contemplates. In other words, the question of diligence or carefulness on the part of the carrier in inspecting the cars has nothing at all to do with the matter now before you. The obligation is laid upon the carrier by the statute to find, in effect, any defect that may exist, when it has, as it had under these circumstances, the opportunity to discover it; and if its inspectors do not discover it, then the carrier is liable for those defects and for the penalty that is imposed for the use of the car having such defects.

That leaves, therefore, for your consideration, in each of these three cases the question of fact whether these cars, or either of them, were defective. You have heard the two inspectors in the service of the Interstate Commerce Commission upon that point, and there is other testimony offered by the defendant carrier which would tend to show that they were mistaken, and you will have to determine what is the fact. They may, perhaps, have mistaken some other car for the one that is spoken of here, or they may not have discovered the things that they said they did discover; instead of the couplers being out of order, they may

have been in order; and those are questions of fact which I submit to the jury for their determination.

There are three separate charges here, and it is in the power of the jury, as they may find the evidence to indicate, to find either that the carrier should pay a penalty of \$300 or of \$200 or of \$100, or that it should pay nothing, according as they may find that one or more of these cars were defective or as they may find that they were all in the order contemplated by the statute.

There is this further to be said: This is what is called a penal statute; that is to say, it is a statute that imposes a penalty. It is not a statute that makes a criminal prosecution or requires a criminal prosecution, or permits, indeed, a criminal prosecution for the violation of its provisions, but it imposes a money penalty. The rules that apply, therefore, in the criminal court do not apply here. It is not necessary that the United States should prove its case beyond reasonable doubt. As you very well understand, that is the measure of proof that is required in a criminal case. It does not apply here. The United States has the burden of proof upon it in order to make out its case. It has the burden of proof from the beginning to the end of it. It never shifts. It is bound to make out its case, and it is bound to make it out by evidence that is clear and satisfactory to the jury. That is the obligation that is laid upon it. Not by evidence which is of that high degree which we describe when we say evidence beyond reasonable doubt, but it is bound to make it out by such evidence as is clear and satisfactory, and by that degree of proof to make out all the elements which go to constitute the charge. If the United States has failed to come up to that standard, then it has failed in this case as to one or more or all of these particular charges, because that obligation rests upon it.

That, I believe, constitutes all the instructions that I need give you with regard to this case. They cover, so far as I can see, all the points upon which I have been asked



to give you specific instructions, and I therefore need not confuse you by reading them over and answering them specially.

The jury rendered a verdict in favor of the United States for \$300.

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UNITED STATES *v.* PENNSYLVANIA RAILROAD  
COMPANY.

(Motion for new trial, reported at 162 Fed. Rep. 408.)

(In the District Court of the United States for the Eastern District of  
Pennsylvania.)

December Term, 1906.

*Decided March 18, 1908.*

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.
3. The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.
4. In order to constitute a violation of the Safety Appliance Act, the car must be moved in a defective condition.
5. Where a car, which had been at rest at a station for a period of time, is taken out upon the road in a defective condition, the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

STATEMENT OF FACTS.

This is an action brought by the United States to recover a penalty of \$100 on account of an alleged violation of the safety-appliance act.

Inspectors of the Interstate Commerce Commission testified that defendant hauled Boston & Albany car No. 12485 from West Philadelphia when the lock set was dis-

connected from the lock block on one end of the car and hung loose on the lift chain. All the parts were present, but were not coupled together, so that the lever was inoperative and the car could not be uncoupled without a man going between the cars for that purpose. The defendant offered evidence that it had inspectors whose duty it was to examine and repair defects; that when defects were found an entry was made in the inspectors' book; that as to this particular car no entry of repairs or defects had been made.

J. WHITAKER THOMPSON, *United States attorney*; JOHN C. SWARTLEY, *assistant United States attorney*; LUTHER M. WALTER, *special assistant United States attorney*, for the plaintiff.

JOHN HAMPTON BARNES, ESQ., for the defendant.

MCPHERSON, *Judge*, (charging jury).

Gentlemen of the jury: Some of you, perhaps all of you, have already taken part in similar trials, but, at all events, you have listened to them, and it is almost superfluous for me to go over what I have already said two or three times. Nevertheless, I will say very briefly what ought to be said with reference to the present case.

There is just one charge here against the Pennsylvania Railroad. It is charged with having out of order one safety appliance upon a car in its possession. It was not one of its own cars; it was a car belonging to the Boston & Albany Railroad; nevertheless, that makes no difference. As you know, railroads are continually interchanging cars; and the act of Congress makes no difference between cars that are owned by a railroad and cars that come upon its system and are hauled by it over its rails. If a car is not in proper operative condition, it is the duty of the railroad to refuse to receive it, as it has a perfect right to do. After receiving it, it is just as much

bound by its condition as if it were its own own car from the beginning. The question of fact here for your determination, about which there is conflicting evidence, is the condition of this car, whether or not it was out of order, whether or not it was out of operative condition, and that is a question of fact that you must resolve. If the car was in order, if the car was in such a condition that it complied with the statute, of course, there has been no offense committed. The second section of this act under consideration requires that the cars shall be so fitted with safety appliances that when the two cars come together there shall be an automatic coupling, by the mere fact of their coming together, the impact of their coming together, the coupling shall be done automatically, and it also requires that there shall be a device by which uncoupling may be performed without the necessity of sending a man between the cars to perform that operation or to assist in it. That is done necessarily through the use of a lever, sometimes of a lever that runs across the entire end, and sometimes of a lever that runs only halfway across, and is as has been testified to you, always upon the left-hand side of the car as one faces it. Either lever complies with the provision of the statute.

Therefore, was this car in that condition? You have heard the testimony of the witnesses upon the stand, the two inspectors who are in the service of the Interstate Commerce Commission, and have testified to you what they say they found. You have heard the testimony of the other witnesses with regard to inspection, such inspection as was made by the Pennsylvania Railroad Company, and from the testimony from both sides, taken together, you must determine whether this car was in operative condition as required by the statute. I have just explained to you what is required. If it was in that condition, then, as a matter of course, the defendant has not committed any offense for which a penalty could be imposed. It is necessary that both

ends of every car should be completely equipped with devices that are in operative condition. It is not enough that one end shall be in good order and the other end not in good order. Both ends, under the statute as I construe it, must be in good working condition. It is the duty of the United States in this suit also to satisfy you by clear and satisfactory evidence that these devices, or one of them, were out of order. The burden of proof is upon the United States, and it rests upon it throughout the course of the trial. It is not bound to show to you beyond reasonable doubt, as would be the case if we were trying an indictment in a criminal case—if this defendant was here on a criminal charge. I say it is not necessary that the measure of proof should rise to that degree, beyond reasonable doubt, but it is necessary, this being an action for a penalty that the United States should take up the burden and carry it, showing by clear and satisfactory evidence that all the elements in this offense were present. If the testimony, therefore, is not of that quality, the United States has failed, and your verdict would have to be for the defendant.

Let me say also that there is no question in the case for your consideration concerning the measure of care or diligence that the defendant may have exercised with regard to inspection. In my construction of the statute, that is not a matter which the act of Congress makes necessary for consideration. As I understand the law, Congress has required a common carrier engaged in interstate commerce to see that these devices are in order under conditions such as are here before us. I am not speaking now of accidents that might happen to them while they were in the course of transportation, when it would be impossible for anybody to know that they were out of order or to repair them, but I am speaking of a condition that may exist while the cars are at rest and when an opportunity is afforded for the process inspection. That was the case here, according to the undisputed evidence. This car and the train of which

it was part lay at the Mantua yards for some hours—I do not know for how long exactly—the precise time is not important, but an opportunity was afforded, at all events, for inspection. That being so, in my construction of the statute, the duty rested upon the carrier to find any defect that existed, and if the defect was there and the carrier failed to find it, it would be liable to the penalty, even although it made an inspection and made it by careful men, who performed their duty according to the best of their ability. The fact that they failed to find it would, while perhaps not a fault in one sense, nevertheless expose the carrier to the penalty. So that the whole case depends upon what you find the question of fact to be. Was this car out of operative condition at the time testified to by the witnesses? I repeat, the burden of proof is on the Government to show you by clear and satisfactory evidence that it was out of order at one or both ends, and if the Government has not so satisfied you, then your verdict must be for the defendant. If, however, it has satisfied you that this was out of order, that one or both ends, of this coupling device were out of order, then your verdict should be in favor of the United States for the sum of \$100.

The jury rendered a verdict in favor of the United States for \$100.

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## UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

(In the District Court of the United States for the Eastern District of Missouri, Eastern Division.)

*Decided June 3, 1908.*

(Syllabus by the court.)

1. An action brought to recover a penalty under the Safety Appliance Act is civil.



2. It makes no difference under the law whether the chains were broken actually in the links or were disconnected; they were in point of fact inoperative, and if the railroad company permitted the cars to be hauled while the couplers were inoperative, then under the statute it is guilty.

The Interstate Commerce Commission lodged with the United States attorney information showing four violations of the safety-appliance law by the Terminal Railroad Association of St. Louis. Defendant made general denial as to all the counts and offered evidence to show that the cars were equipped with automatic couplers, but the chains connecting the lock pins to the uncoupling levers were disconnected and needed only to be connected to make the appliance available.

HENRY W. BLODGETT, *United States attorney*; TRUMAN P. YOUNG, *assistant United States attorney*, and ULYSSES BUTLER, *special assistant United States attorney*, for the United States.

EDWIN W. LEE for defendant.

DAVID P. DYER, *District Judge* (charging jury):

Gentlemen of the jury, this is a proceeding brought by the United States district attorney against the Terminal Railroad Association of St. Louis to recover the sum of \$400. There are four counts in the complaint. It is a civil action, provided by statute for such cases. It is based upon section 2 of an act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes. That act was approved March 2, 1893, and amended by an act of April 1, 1896. The first and second sections of the act are as follows:

That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Section 2 of the act under which this complaint is made is as follows:

That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 6 of the act provided:

That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed.

The fact is conceded that these cars were engaged in interstate traffic. The cars were destined to New York and Philadelphia, received here over some railroad from Kansas City. So there is no question about the cars being engaged in interstate traffic.

Congress has seen proper to enact this statute, made for the purpose of protecting from injury the employees. As to the wisdom of the act you, nor I, have nothing to do. It is the law of the land. It is charged in the first count of this petition (and each of the other counts is the same, with the exception of the cars named in the respective counts) that on or about the 8th day of May, 1907, defendant hauled the said car with said interstate traffic over its line of railroad from St. Louis, within the State of Missouri,

within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end and the "B" end of such car was out of repair and inoperative, the chains connecting the lock pins or lock blocks with the uncoupling levers being broken on said ends of said car.

The main charge here is that the cars were in a condition which made them inoperative under the provisions of this act, and I charge you that it makes no difference whether the chains were broken in fact in the links of the chain or were merely disconnected. It was the duty of the railroad company and its employees to see that those chains were in condition so that they could be used as this act contemplates. They should be in such condition that they could be used without necessitating a man going in between the cars. I fail to find any difference, under the provisions of this act, between a chain that happens to be broken in a link and a chain that is uncoupled and inoperative.

You heard the testimony that was given here yesterday. One witness testified that some of these chains were broken and some were disconnected. Another witness testified that he did not discover the broken chains, but did discover that they were disconnected. The witnesses for the defendant testified that the chains were not broken but were all disconnected. There is no dispute, therefore, that the chains were uncoupled; and it makes no difference under the law whether the chains were broken actually in the links or were disconnected; they were, in point of fact, inoperative, and if the railroad company permitted them to be used while they were inoperative, then under this statute it is guilty.

I therefore charge you that under all the evidence in this case the plaintiff is entitled to recover on each count of its complaint in the sum of \$100, and the court instructs you that under the law and the evidence and the pleading you must return a verdict in favor of the plaintiff in the sum of \$100 on each of the four counts of the complaint.

THE UNITED STATES *v.* ATCHISON, TOPEKA &  
SANTA FE RAILWAY COMPANY.

(In the District Court of the United States for the Southern District  
of California.)

(Syllabus by the court.)

1. The Federal Safety Appliance Act requires carriers subject to the act to find at their peril and repair defects in the safety appliances embraced within the act. If a carrier fails to find and repair such defects it is liable for the statutory penalty.
2. It is incumbent upon the Government to make out its case by clear and satisfactory evidence.

OSCAR LAWLER, *United States attorney*; ALOYSIUS I. McCORMICK, *assistant United States attorney*, and ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

E. W. CAMP, for defendant.

*Decided June 6, 1908.*

WELLBORN, *District Judge* (charging jury):

Gentlemen of the jury: The circumstances of this case do not call for nor admit of any protracted or elaborate statement or explanation of legal principles, and I shall not needlessly consume time, therefore, in preparing written charges. Indeed, I think that the mere reading of the provisions of the safety-appliance act of Congress, on which the Government relies for recovery in this case, will enable you intelligently to perform your duties as jurors and pass upon the facts. I will suggest to you what those duties are, and indicate the correct method of their performance.

The act of Congress in question seems to have been passed in 1893—the amendment. The first section is as follows:

*Be it enacted by the Senate and the House of Representatives—*

I will only read the pertinent portions of the section to you—

*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled* That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive or engine, in moving interstate traffic, not equipped with a power driving-wheel brake.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or used on its line, any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, or until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for a railroad company to use any car in interstate commerce that is not provided with grab irons or hand-holds in the ends and sides of such car, for the security of the men in coupling and uncoupling cars.

SEC. 6. That any such common carrier using any locomotive engine running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney of any District Court of the United States having jurisdiction of the locality where such violation shall have been committed. It shall be the duty of said District Attorney to bring suits upon duly verified, etc.

Those provisions that I have read are the pertinent provisions of the law.

There is no controversy that the defendant, at the times mentioned in the complaint, was a common carrier engaged in interstate commerce by railroad, and that the engines and cars mentioned in said complaint were used in hauling and moving interstate traffic, and the only questions for you to determine are whether or not the appliances on the engines and cars mentioned in the complaint were out of order, as alleged in the complaint. Whether or not the defendant inspected said engines and cars, and was diligent and careful in inspecting them, is not a matter you need concern yourselves about. The act requires defects in the appliances to be found at the peril of the company, and if it fails to find them the company is responsible for the penalty. If



the Government has not made out its case by clear and satisfactory evidence your verdict should be for the defendant. If, however, you are satisfied from the evidence that either of said engines or cars was not equipped with the appliances required by the acts of Congress to which I have called your attention, or that such appliances were defective and inoperative, then such engine or car was out of order in that particular respect, and your verdict on the count relating thereto should be for the Government. You can find for the plaintiff or defendant on any one or more or all of the counts, as the evidence seems to you to require.

Verdict for plaintiff.

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UNITED STATES *v.* THE CINCINNATI, HAMILTON  
& DAYTON RAILROAD COMPANY.

(In the District Court of the United States for the Northern District  
of Ohio.)

*Decided June 24, 1908.*

(Syllabus by the court.)

The Federal Safety Appliance Law lays an unqualified duty upon a railroad company subject to the act to keep its coupling devices in a certain condition (*Railroad Company v. Taylor, Administratrix*, 210 U. S. 281), and when an employe of such company deliberately puts such devices in another condition, which condition the law undertakes to prevent, then the company is required to respond under the penalty for the unlawful act of its employe.

WILLIAM L. DAY, *United States attorney*, JOHN S. PRATT, *assistant United States attorney*, and ROSCOE F. WALTER, *special assistant United States attorney*, for the United States.

JULIAN H. TYLER, for defendant.

## STATEMENT OF FACTS.

The defendant company was charged with hauling upon its railroad its own engine No. 90 when it was not equipped in compliance with the Federal safety-appliance law, in that the uncoupling lever was missing from the "A" end of the engine. The defense was made that inasmuch as the uncoupling lever had been removed by the employees of the defendant company for some reason best known to themselves and without the order or consent of the company, it should not be held to answer for such act of its employees, because the very object of the act under which this suit is brought is to secure the safety of such employees.

U. S. V. C., H. & D. R. R. CO.

## OPINION.

(On motion by plaintiff for judgment on the pleadings.)

TAYLER, *District Judge* (orally):

I suppose that the administration of this law must of necessity be attended with a certain amount of strictness of construction, and, in many cases, of hardship. It is practical results which the act seeks to accomplish. It seeks to insure the safety of employees, in so far as that may be accomplished by regulating coupling devices and grab-irons. It is perfectly conceivable that in four cases out of five the condition in which the grabiron or the coupling device is found may be due to the carelessness or willful act of one of the very class of employees whose safety is sought by the legislation. Where an act lays the unqualified duty upon a railroad company to keep its coupling devices in a certain condition and one of its employees deliberately puts it in another condition, which is a condition that the law undertakes to prevent, then the corporation is required to respond, under this penalty, for the unlawful act of its employees.

I do not see how we can escape the rule of law which makes the corporation responsible for the acts of its employees, because it is only through employees as its representatives that it can act at all. From the standpoint of practical administration of the law, it would be practically impossible to administer it if it should be held that it was a defense to a charge that the coupling devices were not in the condition which the law requires, or that a grabiron was in a condition that was unlawful, that such condition was due to the act of one of a class of employees for whose benefit and protection this legislation was enacted, and the corporation was therefore not liable. If that was true, the statute would be in many cases practically inoperative.

If I catch the spirit of this law as that spirit has been declared, especially in this latest case decided by the Supreme Court on the 18th of May (*Railroad Co. v. Taylor, admx.*), then certainly it must be said that the fact that the condition in which the lever which ought to be attached to a coupling device is found, is due to the willful act of an employee, yet since the result is the failure to perform an unqualified duty laid upon the railroad company by Congress, it must be said to be a violation of the law.

It will be necessary to sustain the motion for judgment on the pleadings, and an exception will be noted.

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## UNITED STATES *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

(In the United States District Court for the Northern District of  
California.)

[167 Fed. 696.]

*Decided December 1, 1908.*

(Syllabus approved by the court.)

1. If a carrier hauls over its line any cars which can not be coupled automatically by impact, either by reason of being improperly

- equipped, or the equipment being out of order, or disconnected, or otherwise inoperative, the act is in violation of the Safety Appliance law.
2. The Safety Appliance statute applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled.
  3. Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right, without incurring the penalty of the law, to haul the defective car to the nearest repair point on their line. But if they haul such car from a repair point, they are liable for the statutory penalty.
  4. It is the duty of the carrier, subject to the Safety Appliance Acts, to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law. At such repair points there should be the material and facilities to make all such repairs.

ALFRED P. BLACK, *Assistant United States attorney*, and  
MONROE C. LIST, *special assistant United States attorney*,  
for the United States.

C. L. BROWN and HORACE PILLSBURY, for the defendant.

#### INSTRUCTIONS TO JURY.

DE HAVEN, *District Judge* (charging jury):

You are instructed that section 2 of the safety-appliance act imposes upon the defendant an unqualified duty to equip its cars with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars; and if the defendant hauled over its lines of railroad any cars which could not be so operated, either by reason of being improperly equipped, or by reason of the original equipment being out of order, or disconnected, or otherwise inoperative, your verdict should be for the Government as to each and every car so hauled.

You are instructed that section 2 of the safety-appliance act applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled. The equipment on each end of every car must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.

You are instructed that in actions arising under the safety-appliance act the Government is only required to prove by a fair preponderance of the evidence the existence of the defects as set out in the complaint.

If from the evidence you find that the cars, or either of them, described in the petition, or in some count thereof, were equipped with the requisite couplers and grab irons, and that they were in the condition required by the law when they were received by the defendant to be hauled over its line of railroad as stated, but during the time they were being so hauled the couplers or grab irons from any cause became injured or out of repair upon any of the cars so that they were not in an operative condition, then the defendant would be required to immediately repair said defects and put the appliances in operative condition if it could do so with the means and appliances at hand at the time and place when and where it discovered their defective and inoperative condition, or when such condition should have been discovered by the exercise of reasonable care on the part of its agents or servants charged with that duty. But if it did not at such time and place have the requisite means or appliances at hand to remedy such defect and put the couplers and grab irons in operative condition, then it would have the right, without incurring the penalty of the law, to haul such car or cars to the nearest repair point on its line where such defects could be repaired and the appliances put in operative condition. But if such defective or inoperative condition of the couplers and grab irons existed at a repair point on defendant's line or at a place where



such defects could have been remedied, then if it hauled said cars from such place in such condition it would do so at its peril and be liable for the statutory penalty for so hauling or using such car described in any count of the petition.

You are instructed that it is the duty of a railroad company, subject to the provisions of the safety appliance act, to establish reasonable repair points along its line of railway for the making of repairs of the kind necessary to comply with the law; that is to say, repair points at places where they are reasonably required; that it is also the duty of such railroad company to have on hand at such repair points the material and facilities necessary to make all such repairs, and that such railway company must use reasonable foresight in providing material and facilities for such purpose; and if the jury believes that the defendant hauled any car defective as to safety appliances over its line of railroad from any such repair point, where by the exercise of reasonable diligence and foresight such repairs could have been made, your verdict should be for the Government as to each and every car so hauled.

You are instructed that if the defendant hauled any car over its line of railroad from or through any point in a defective condition, it is wholly immaterial that the defendant had no shops, material, or facilities for repairing the defects at that place, if it can be shown that said car had started from a repair point upon the line of defendant's railroad in the same defective condition, and where such repairs could have been made had the defendant exercised reasonable diligence and foresight in providing such repair point with the proper material and facilities for the making of all repairs necessary to comply with the safety appliance act, your verdict should be for the Government as to each and every car so hauled.

Your verdict should be for the Government as to each and every car so hauled upon that state of facts.

(The jury returned a verdict for the United States on the second, fourth, fifth, and eighth causes of action, and not being able to agree as to the balance of the counts, was discharged.)

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UNITED STATES *v.* NEVADA COUNTY NARROW  
GAUGE RAILROAD COMPANY.

(In the District Court of the United States for the Northern District  
of California.)

[167 Fed. 695.]

*Decided November 28, 1908.*

(Syllabus by the court.)

1. In an action brought to recover the statutory penalty under the Safety Appliance Acts a preponderance of the evidence that the defective car was hauled as alleged is sufficient to charge the defendant.
2. If the coupling and uncoupling apparatus on a car is so constructed that in order to open the knuckle when preparing the coupler for use or in uncoupling the car it is reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position such car is not equipped as required by section 2 of the Safety Appliance Act.

STATEMENTS OF FACTS.

The Interstate Commerce Commission lodged with the United States attorney information showing violations of Safety Appliance Law by the Nevada County Narrow Gauge Railroad Company. The declaration was in two counts, each count charging a violation of section 2 of the statute, the allegation being that the couplers were out of repair and inoperative.

ALFRED P. BLACK, *assistant United States attorney*, and  
MONROE C. LIST, *special assistant United States attorney* for  
the United States.

FRED SEARLS, for defendant.

## INSTRUCTIONS TO JURY.

DEHAVEN, *District Judge* (charging jury):

The statute under which this suit is being prosecuted makes it unlawful for any common carrier engaged in interstate commerce "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

The complaint in this case charges the defendant with a violation of this statute, and the question is for you to determine; it is a simple question of fact for you to determine.

The jury is instructed that if it believes from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when the coupling and uncoupling apparatus on either end of said car was so constructed that in order to open the knuckle when preparing the coupler for use it was reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position, then its verdict should be for the Government.

You are instructed that if you believe from a preponderance of the evidence that the defendant hauled the car, as alleged in the first count of plaintiff's petition, when said car was not equipped with couplers coupling automatically by impact and which could be both coupled and uncoupled without the reasonable necessity of a man going between the end sills of said cars, then your verdict should be for the Government.

There are two counts in this petition. The first one is the only one that is contested; the second has been admitted by the defendant—that is, there is no defense to it.

The form of the verdict is: "We, the jury, find for the"

plaintiff or defendant, as you believe, on the first count of the petition, and for the plaintiff on the second count of the petition.

Verdict for Government on both counts.

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UNITED STATES *v.* CHESAPEAKE AND OHIO  
RAILWAY.

(In the District Court of the United States, Southern District of West Virginia.)

*Decided December 2, 1908.*

1. A suit for the penalty prescribed in section 6 of the federal safety appliance act of March 2, 1893, as amended April 1, 1896, as amended March 2, 1903, is a civil action, and in such suit to entitle the Government to recover it is necessary that the facts which constitute a violation of the act be proved by a preponderance of the evidence, and not beyond a reasonable doubt.
2. The statute requires that the coupler on each end of every car hauled in a train containing interstate commerce shall be in operative condition as required by the act, and this whether the car be loaded or empty.
3. In counting the cars in a train to ascertain the percentage of cars equipped with air appliances, as required by the act, the engine and tender are to be counted as separate and distinct cars.
4. If a railroad company subject to the act hauls a car or train in interstate traffic not equipped as required by the statute it does so in violation of the law.

ELLIOT NORTHCOTT, *United States attorney*; H. DELBERT RUMMEL, *assistant United States attorney*; ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

SIMMS, ENSLOW, AND FITZPATRICK for defendant.

KELLER, *District Judge* (charging jury):

Gentlemen of the jury, this is a civil action brought by the Government of the United States against the Chesapeake and Ohio Railway Company, under the provisions of what

are known as the "safety appliance acts," to recover penalties for the alleged violation of those acts, the declaration or petition containing 17 counts. The first two of which, however, allege in different terms the same violation, and the 5th and 6th of which allege in different terms the same violation; therefore before this case was submitted to you the Government withdrew from your consideration counts 1 and 5 and left the declaration consisting of 15 counts, which are numbered, respectively, from 2 to 4 and 6 to 17.

There are 15 separate violations of the law charged here. Now, I have but very little to say to you, but I want to give you the legal principles so far as I think should govern your consideration of this case.

First, I will say that, the action not being criminal, the Government is simply obliged to prove the facts which constitute a violation of this act by a preponderance of the evidence, and not, as in criminal actions, beyond all reasonable doubt.

I also instruct you that upon the question of the safety appliances to wit, couplers upon cars moved by a railway engaged in interstate commerce, that the statute requires the coupler on each end of every car be in operative condition, so that a person need not go between the cars to couple or uncouple any two cars, no matter on which side of the train he is.

It was in evidence in this case that the coupling device on the end of the car, joined to another, in certain instances were out of order, so that that particular coupler could not be operated, and although it may have been true that the coupling device on the other car attached to that could have been operated, it would be from the other side only of the train; and such a condition existing, was a violation of the terms of the act, for which if the car was being moved in a train carrying interstate commerce the railway company would be liable.

I also instruct you that the loading of the car is immaterial.



It is immaterial whether it be empty or loaded, if it is involved in the movement of a train containing interstate traffic, and the Government in the preparation of its declaration in one or more counts in which that question was involved was careful to allege in such counts that in the train of which this car out of order was a part there was at least one car loaded with traffic consigned to points without the State of West Virginia.

I have been asked to give you certain instructions on behalf of the defendant in the case, one of them being the instruction that I have already embodied in my charge to you, to the effect that it is necessary that the Government prove its case by a preponderance of the evidence.

I was also asked to instruct you regarding the violations charged in the 2nd count and in the 6th count, that in fixing the number of cars in a train the engine and tender are to be counted as two separate and distinct cars. I think that is correct. The only effect of that would be in determining whether a sufficient proportion of cars were equipped with air, under the law as it was introduced in evidence to you. You will recall that in the act it was provided that the Interstate Commerce Commission might from time to time determine what proportion of a train must be equipped with air brakes under the control of the engineer, the act at the time of its passage fixing 50 per cent. as the minimum proportion of cars to be so equipped; and later under this power of determination the Interstate Commerce Commission, by resolution, raised that minimum to 75 per cent. It is alleged in count 2 and in count 6 that in the 2 trains referred to in those counts this minimum of cars operated by the engineer by air power was not reached. In other words, that in one train but 71 per cent. in place of 75 per cent. were so equipped, and the other one, I believe, less.

Now, I think that is a correct interpretation of the law, that in determining the proportion of cars controlled by air you should count the engine and the tender as 2 of

the cars, they being, unless shown to be otherwise, equipped with air, because the engineer controls the air from the engine.

However, according to my understanding of the testimony in this case, that would not affect the defendant upon these charges, because according to my recollection of the testimony, and you will no doubt recall it, the train referred to in count 2 is alleged to have been composed of 45 cars, exclusive of the engine and tender, of which 13 were not equipped with air so as to be under the control of the engineer. Now, adding to the 45 cars the 2—respectively, engine and tender—you have 47, and 75 per cent. of 47 would require that at least 35 cars, including the engine and tender, be so equipped as to be under the control of the engineer for air braking, which would leave 12 as the maximum number that could be without such control. The proof in the case, as I recall it, was that there were 13 cars without such control, and if you find that to be the fact the statute was violated. As to the other train referred to in count 6, my recollection is that the percentage of cars equipped with air was smaller than in the one I have referred to.

I have been asked to give you an instruction on behalf of the Government, and I do so accordingly:

The court instructs the jury that if they believe from the evidence that the defendant company hauled the trains and cars as alleged in the declaration in the condition alleged in said declaration, then they shall find for the plaintiff on the counts, except 1 and 5, which have been withdrawn.

In other words, the Government's evidence in this case, if believed by the jury, makes a case under the statute, and therefore, if you believe the evidence of the Government, it would be your duty to find on each count except the first and fifth.

Verdict for Government.

## UNITED STATES v. SOUTHERN PACIFIC COMPANY.

(In the United States District Court for the Northern District of California.)

[167 Fed. 699.]

*Decided December 4, 1908.*

(Syllabus approved by the court.)

1. If a carrier hauls over its line any cars which can not be coupled automatically by impact, either by reason of being improperly equipped or the equipment being out of order or disconnected, or otherwise inoperative, the act is in violation of the safety-appliance law.
2. The safety-appliance statute applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on the adjacent car, or on any other car or cars, to which each car sued upon was or was to be coupled.
3. Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right, without incurring the penalty of the law, to haul the defective car to the nearest repair point on their line. But if they haul such car from a repair point, they are liable for the statutory penalty.
4. It is the duty of the carrier subject to the safety-appliance acts to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law; at such repair points there should be the material and facilities to make all such repairs.
5. The railway company is under no obligation to receive from any other company cars defective as to safety appliances and when it does receive cars from another company at any point it must know at its peril that each car so received is equipped with the safety appliances required by law, and that such appliances are in good order and condition.
6. It is the use of a car in a defective condition that the law seeks to prevent, and not the length of the haul.
7. If an employee of a railway company deliberately puts coupling devices on a car being used in interstate traffic in a condition which the law undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employee.

ALFRED P. BLACK, *assisiانت United States attorney*, and  
MONROE C. LIST, *special assistant United States attorney*  
for the United States.

CHARLES P. HEGGERTY for the defendant.

INSTRUCTIONS TO JURY.

DEHAVEN, *District Judge* (charging jury):

You are required to return a verdict in each of these cases. The first one is 13757, and contains ten causes of action; the second one is numbered 13760, and contains two causes of action.

The first two causes of action stated in No. 13757 charge a violation of section 1 of what is known as the safety appliance act. In reference to those two counts, I now instruct you it will be your duty to return a verdict for the Government. The remainder of the counts in No. 13757 charge a violation of section 2 of the safety appliance act. And that you may understand precisely the questions of fact upon which you are called to pass, I will read this section of the law to you:

“That from and after the first day of January, eighteen hundred and ninety-eight it shall be unlawful for any such common carrier”—that is, a common carrier engaged in interstate traffic—“to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.”

This section of the law applies to the coupler on each end of every car subject to the law, and it is wholly immaterial in what condition was the coupler on any adjacent car or on any car to which each car sued upon was or was to be coupled. The equipment on each end of every car must be in such condition that whenever called upon for use it can be operated without the necessity of men going between the ends of the cars.

The law also means that each car must be equipped with an uncoupling lever on each end thereof, by means of which such car can be at all times uncoupled from another car by a man standing at one end on the side of the car, and without the reasonable necessity of going between such car or any other car, or without going around the end of the train in which said car might be hauled, or without crawling under or over said cars, in order to reach the uncoupling lever of the adjacent car.

While the safety-appliance law does not ask a railway company to do the impossible, it does, nevertheless, place upon such company the responsibility of properly equipping its cars in the first instance, and the maintaining of such equipment in good operative condition at all times thereafter. Of course, if, while a car is being hauled between repair stations, some defect occurs to its safety appliances, such railway company must use the utmost care to discover and repair such defects, if the nature of the repairs will permit of their being made at that time and place. Should such defect be of a heavy nature only to be made at repair stations, then the company would have the right, without incurring the penalty of the law, to haul such car to the nearest place where such repairs can be made. In doing this, the company can not choose its place of making repairs, but must avail itself, for that purpose, of the nearest point where, by the exercise of diligence and foresight, it may prepare to make such repairs. And it is the duty of every railway company subject to this law to establish reasonable repair points along its line of railroad for the making of all repairs necessary to comply with the law; that is, it is its duty to establish repair points at all places along the line of road where it is reasonably necessary that they should be established in order faithfully to comply with the law. Inasmuch as inability alone will not excuse a company from a literal compliance with the law, it is the duty of such company to have the material and facilities on hand at every repair point to make repairs of the kind



necessary to comply with the provisions of the safety-appliance act. And if a defect exists at a repair point, or at any place where such defect could have been repaired, and the company moves the car while in the defective condition, it does so at its peril, and it becomes then subject to the penalty of the law. The law is not satisfied by the exercise of reasonable care to this end; but the company must at its peril discover and repair all defects before removing a car from a repair point.

A railway company is under no obligation to receive from any other company cars defective as to safety appliances, and when it does receive cars from another company at any point it must know at its peril that each car so received is equipped with the safety appliances required by law, and that such appliances are in good order and condition.

The penalty under the safety-appliance act applies to every defective car hauled contrary to its provisions, whether or not each car was hauled separately or in a train together; and it matters not how far each car was hauled; it is the use of the car in a defective condition that the law seeks to prevent and not the length of the haul.

Now, as to the different counts:

In the first and second counts of 13757 you are instructed to find for the plaintiff.

The third count charges the hauling of C., B. & Q. car No. 61488 when the coupling and uncoupling apparatus was missing from the B end and when said car was chained to another car. If you believe that the defendant so hauled this car from Truckee in this condition, and that Truckee was a repair point along the line of the defendant company, your verdict should be for the Government.

The fourth count charges the hauling of S. P. car No. 48602, when the knuckle was missing from the A end and when the car was chained to another car. You are instructed that the law lays an unqualified duty upon a railroad company to keep its coupling devices in a certain prescribed condition, and if an employee of such company deliberately puts

such devices in another condition, which condition the law undertakes to prevent, then the company is liable to respond under the penalty for the unlawful act of the employee, and if you believe from the evidence that the knuckle was removed from this car for the purpose of chaining it to another car, and that the car was so hauled in interstate traffic in that condition, and in that condition it would be necessary for a man to pass between the end of that car and an adjacent car in order to couple and uncouple them, your verdict should be for the Government.

The fifth count charges the hauling of B. & O. car No. 57286, when the keeper or inner casting was broken on one end and the uncoupling lever hanging down on the coupler. If you believe that this uncoupling lever was in such condition that any reasonable effort would not operate the same, and that in order to uncouple this car from another car it would have been reasonably necessary for a man to go between the cars, and that in that condition the car was hauled over the line of defendant's road in interstate traffic, then your verdict should be for the Government on that count.

The sixth count charges the hauling of C., M. & St. P. car No. 58960, when the bottom clevis pin was missing on the A end. If you believe that the car was in that condition, and that the absence of this pin rendered the uncoupling lever inoperative, and that in order to uncouple this car from another car it was reasonably necessary for a man to go between the ends of the cars, and that in that condition the car was hauled over the line of defendant's road in interstate traffic, then your verdict should be for the Government.

The seventh count refers to a "kinked" chain. If this car left Truckee while the chain was so "kinked," and while in this condition the coupler was inoperative, requiring the reasonable necessity of a man to go between the cars to couple or uncouple them, your verdict should be for the Government.

The eighth and ninth counts are similar to the fifth and seventh counts, respectively, and what I have said in regard to those, you can apply to these counts.

The tenth and the last count in No. 13757 charges the use

of a locomotive engine when the coupler was missing from the A or front end. It is not necessary that this end of the locomotive was used or was coupled to any car, that is, front end or A end; it is the use of the locomotive in a defective condition that the law seeks to prevent, and if you believe that this locomotive was used by the defendant upon its line of railroad in connection with other cars engaged in hauling interstate traffic, and not used for the purpose of taking it to the nearest point where it could be repaired, your verdict should be for the Government. Of course, if you find that it was only taken to Sparks, and find that that was the nearest place where it could be repaired, and that it was only taken there for that purpose, then your verdict should be for the defendant on that count.

The first and second counts, and the only counts, in case No. 13760, charge the hauling of two cars chained together. If you believe that these cars were delivered to the Southern Pacific Company in such a condition by another company, that is, if you believe they were delivered to them in such a condition as has been testified to by the witnesses for the Government, and you should find that the defendant in hauling interstate traffic used them on its train engaged in interstate traffic, your verdict should be for the Government. One carrier can not receive a defective car from another carrier and excuse itself; it must discover such defect at its peril before it receives and hauls any such car in interstate traffic.

I need not say to you, but I will say to you, that you are the exclusive judges of the credibility of the different witnesses who have testified in your hearing; that is, you must determine for yourselves which witness or witnesses you will believe, and then after you have fixed that in your mind you are also the exclusive judges of what ultimate facts are shown by such testimony.

In considering this testimony, positive testimony is to be preferred to negative testimony, other things being equal;

that is to say, when a credible witness testifies as to the existence of a fact at a particular time and place and another equally credible witness testifies to having failed to observe such fact, the positive declaration is ordinarily to be preferred to the negative in the absence of other testimony or evidence corroborating the one or the other. Nevertheless, that is a question for you solely in passing on the weight to be given to this positive and negative testimony. If, in your judgment, the testimony of the witness who says that he did not see a thing is entitled to weight; that the circumstances surrounding him at that time, at the time he made the examination, were such that if the fact had existed he would have seen it, then as a matter of course you would be at liberty to find that the fact did not exist; that is simply a rule of common sense in weighing testimony.

In regard to the burden of proof, the burden of proof is on the Government to establish by preponderance of evidence the facts charged in the different counts of the petition. And by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which to your mind is the most satisfactory and is entitled to the greatest weight.

A JUROR. I should like to ask a question: In taking that engine from Truckee to Sparks, is it a breaking of the law as interpreted by hitching it to a train, or does it have to go down alone?

The COURT. If Truckee was a repair point and a place where the engine ought to have been repaired, and it was attached to a train engaged in interstate traffic and taken to Sparks, that would be a violation of the law. But if Truckee was not a repair point, and the engine could not have been repaired at Truckee, and was simply taken down to Sparks for the purpose of repair, I should say that that would not be a violation of the statute.

Another JUROR. I should like to ask a question in regard to the two cars at Richmond: Would those two cars be considered as engaged in interstate traffic?

The COURT. That is a question for the jury to determine from the evidence in this case. If they were attached to other cars engaged in interstate traffic, then they would be engaged in interstate traffic.

Another JUROR. If the engine referred to needed repairs, and could only be repaired at Sparks, but was used between Truckee and Sparks in the hauling of a train as far as that point, should we find for the Government?

The COURT. If the engine could not be repaired at Truckee, and the company, under the law I have laid down before you, was not required to be able to repair it there, and it was moved to Sparks for the purpose of being repaired, I should say that the mere fact that it was attached to an interstate traffic train would not render the company liable if the main purpose in removing was to repair it.

(The jury returned the following verdict: In case 13760, for the United States; in case 13757, for the United States on the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th causes of action set forth in the complaint; and for the defendant on count 10.)

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## UNITED STATES *v.* BOSTON & MAINE RAILROAD COMPANY.

(In the District Court of the United States for the District of Massachusetts.)

[168 Fed. 148.]

*Decided January 5, 1909.*

(Syllabus by the court.)

1. Section 4 of the safety appliance act requires secure grab-irons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling and uncoupling cars greater security than would be afforded them in the absence of any grab-iron or handhold at that point or of any appliance affording equal security with a grab-iron or handhold.



2. If at any place in the end of a car there is not a grab-iron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, which afforded equal security with a grab-iron or a handhold at that point, the Federal safety appliance law so far as grab-iron or handhold at that point is concerned has not been violated. Having something there which performs all the functions of a grab-iron or handhold is just the same thing as having what is properly called a grab-iron or handhold at that point.
3. Unless the Government satisfies a jury by a preponderance of the evidence that there was no grab-iron or handhold on the car where there should have been one, the jury should find for the railroad company.
4. A man engaged in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the safety appliance act, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars.
5. Where a car is not properly provided with grab-iron on a given day, and the train stops for a certain time and then goes on again, there are not two violations of the law, but only one, because the car is all the time being moved in the same train. It makes no difference that it is being so moved on two different days.
6. A "train" is one aggregation of cars drawn by the same engine, but if the engine is changed then there is a different train.

WILLIAM H. GARLAND, *assistant United States attorney*, and PHILLIP J. DOHERTY, *special assistant United States attorney*, for the United States.

CHARLES S. PIERCE, for defendant.

#### INSTRUCTIONS TO JURY.

DODGE, *District Judge* (charging jury):

The statute which we are considering in this case is a statute passed by Congress under the power which is intrusted to Congress by the Constitution to regulate commerce between the several States. Congress makes this law in regulation of interstate commerce; it has the power to make such regulations. If we were dealing here with a railroad or a train which was not engaged in interstate com-

merce at all, this statute would not apply. It does not seem to be disputed in this case that the defendant railroad, and the car with which you are concerned, were both engaged in interstate commerce, and therefore were subject to the provisions of the statute. The defendant railroad is charged in the declaration which the Government has filed against it with five different violations of the statute. It is for the jury to say as to each of those violations charged whether the defendant has committed it or not.

As to three of the violations charged, while the jury is still to say whether this defendant has committed them or not, they are saved the trouble of deciding any disputed questions of fact, as this case goes to them. As to the violation of the statute charged in the second count of the declaration, the defendant admits that it has been committed, and that the jury may find for the plaintiff upon the count. The same as to the third count of the declaration, the jury are to find for the plaintiff also on that count by consent of the defendant.

As to the fourth count of the declaration, the court has ruled that the evidence is not sufficient to warrant a verdict for the plaintiff, and the jury therefore will find for the defendant as to that count by direction of the court. You are aware, gentlemen, that in all cases tried before you, questions of law are for the court and questions of fact are for the jury. The question presented here on the fourth count of the declaration is an example of a question of law. The court takes upon itself the responsibility of directing the jury to find for the defendant on that count. In this instance, and in all other instances where either party thinks that the court has decided the question wrongly, they have a remedy by appeal. They may go to the Circuit Court of Appeals within this circuit and have that court determine whether this court has rightly decided the question or not. But it is for you to follow the direction of this court for the time being, in order that the question may be

properly presented on appeal. Therefore although your verdict as to the fourth count is by direction of the court a finding for the defendant, it is a verdict of which the court takes the entire responsibility.

Now, gentlemen, I come to the two counts which are submitted to you for your consideration. They both relate to the same car—a car No. 24089, a car marked “New York, New Haven & Hartford Railroad,” a box car—and the Government charges as to that car, while being hauled in a train from Springfield to the Brightwood yard, that on September 19, 1907, it was not provided with a grab-iron or handhold such as the law requires. And in the fifth count, as to the same car, the Government charges that on September 20, 1907, while being moved from the Brightwood yard northerly, it was not provided with a grab-iron or handhold such as the law requires. It is not disputed, as I have stated, that this car was being used in interstate commerce at these times. Now, the question for you to decide is: Did that car, or did it not, have on it grab-irons or handholds such as the statute requires that it should have while it was being moved by the railroad in interstate commerce?

I will read to you once more the language of the section of the statute with which we are concerned:

“From and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.”

There is no question made either on September 19 or September 20 about the sides of this car. We are concerned only with the ends. Now, taking that section as it stands, and giving due weight to the language in which the requirements are expressed, we have to consider just what they mean as applied to the question arising in this case, and I

shall instruct you, gentlemen, that section 4 requires secure grab-irons or handholds at those points in the end of each car where they are reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab-iron or handhold at that point or of any appliance affording equal security with a grab-iron or handhold. If at any place in the end of this car there was not a grab-iron or handhold, properly speaking, but some other appliance, such as a ladder or brake lever, or whatever else you please, which afforded equal security with a grab-iron or a handhold at that point, then I shall instruct you that the law has not been violated so far as a grab-iron or handhold at that point is concerned. Having something there which performs all the functions of a grab-iron or a handhold is just the same thing as having what is properly called a grab-iron or a handhold at that point. It may not be possible to say that a coupling lever or a ladder is a grab-iron or a handhold, but if it affords the same security to a man who may need to use one that a grab-iron or a handhold, properly speaking, would afford, then, in my judgment, the statute has not been violated.

The question of fact, therefore, for you is: Are you satisfied by a preponderance of the evidence that there was anywhere in the end of this car a grab-iron or a handhold wanting where it should have been according to the test which I have given you; that is, where a grab-iron or a handhold would be reasonably necessary in order to afford to men coupling or uncoupling cars greater security than would be afforded them in the absence of any grab-iron or handhold at that point?

Now, that question you are to determine by a preponderance of the evidence here. You have listened to the evidence of the two inspectors of the Interstate Commerce Commission, who tell you that they examined this car on the two days referred to, and they described to you pretty fully what they found on the end of the car in question, and

they tell you that at a certain place there was no grab-iron or handhold.

Now, on the other hand, you have the evidence introduced by the defendant railroad, which may induce you to think that the presence of a grab-iron or a handhold where the inspectors have said that one was absent would make no difference, so far as affording greater security to men is concerned.

You are to be satisfied by the Government in this case by a preponderance of the evidence that there was no grab-iron or handhold where there should have been one. If you are so satisfied, you should find for the plaintiff, for the Government in this case. Unless the Government has so satisfied you by a preponderance of the evidence, you should find for the defendant.

Now, you are to remember in this case that you are to decide it according to a preponderance of the evidence. In all the other cases to which you have listened here and which, as I recall it, have been criminal cases, I have instructed you that the Government, in order to convict, must prove its case beyond a reasonable doubt. This not being a criminal case, according to my view, the same rule does not prevail. A preponderance of the evidence in this case is sufficient; and what does that mean? It means that after balancing and considering the evidence on the one side and on the other you are not left in doubt, but that you find that the evidence for the Government outweighs the evidence brought here to meet it. If your minds after weighing and considering the evidence on both sides are left in doubt, if they are left equally balanced on the question, there is no preponderance of the evidence; and in that event, as I have told you, your verdict should be for the defendant. It is necessary, in order to find a verdict for the plaintiff, that the evidence for the Government should outweigh that for the defendant.

I have stated to you that grab-irons or handholds are required by the statute to be at such points in the end of



this car where they are reasonably necessary in order to afford greater security to men in coupling or uncoupling cars. Something has been said here about men connecting or disconnecting the air hose with which the air brakes are operated, and the question has been raised, is a man between the cars simply to connect or disconnect air hose a man engaged in coupling and uncoupling cars within the meaning of the statute? Now, on that point I instruct you that a man engaged in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of the statute if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars.

The Government claims here that it has proved to you by a preponderance of the evidence not only one violation of the statute, but two. Now, on that point, gentlemen, you will consider whether or not this car, in the first place, was unprovided with grab-irons or handholds, as it should have been, and, in the second place, whether it was moved by this railroad in more than one train. Let us suppose that you have found that that car was on a given day not properly provided with grab-irons and handholds as the statute requires. Let us suppose that that car was at the time being moved in a train. Let us suppose that that train stopped for some purpose, no matter what, for a while, and, after having so stopped for a certain time, started up and went on again. Now, in a supposed case like that, my instruction to you would be that there were not two violations of the law, but only one, because the car was all the time being moved in the same train. I should instruct you, gentlemen, that so long as the car is being all the time moved in the same train, it makes no difference that it is being so moved on two different days; that so long as the car continues being moved by the railroad on the same train it makes no difference that September 19 has run out and September 20 has come in; that that does not make two distinct violations of the statute, but the movement of the car being,

though on those two different days, all the time in one train, there has only been one violation of the statute. You will consider upon the evidence to which you have listened whether this car has been moved in more than one train. If you so find, it will be proper, provided you have been satisfied by a preponderance of the evidence that it was being so moved without the grab-irons and handholds which the law requires, to find for the plaintiff both on the first count and on the fifth count. If, on the other hand, you are not satisfied by a preponderance of the evidence that the car was moved in two trains, but was only so moved in one, that both on September 19 and on September 20 the car was continued all the time in one train, you should then find for the plaintiff only on one of those counts, either the first or the fifth, but you should not find for the plaintiff on both of them.

Is there anything else which counsel desire me to speak to the jury about?

[Counsel confer with the court at the bench.]

The COURT. In regard to what makes a train, Mr. Foreman and gentlemen, by "train" I understand one aggregation of cars drawn by the same engine, and if the engine is changed, I understand there is a different train.

Verdict for Government, four counts.

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## UNITED STATES *v.* BALTIMORE & OHIO RAILROAD COMPANY.

(In the District Court of the United States for the Northern District of West Virginia.)

*Decided January 18, 1909.*

(Syllabus by the court.)

1. The federal safety-appliance act makes no exception and places no limitations upon the duty of a railroad company to equip its cars with the prescribed safety appliances.

2. It is the duty of a common carrier subject to the law to use at all times reasonable care to discover and repair all defects to its equipment; but if a defect exists at a repair point, or at any place where such defect could be repaired, and the company moves such car from such a point, it does so at its peril and is liable for the statutory penalty; the exercise of reasonable care to discover and repair defects at such a place is no defense.
3. The law neither defines a handhold nor the exact location of same, and it is for the jury to determine whether a car is equipped with proper handholds or with such suitable substitutes as will give to the employes greater security in the coupling and uncoupling of cars.
4. Actions arising under the safety-appliance act are civil, and not criminal actions, and the Government is only required to establish by a preponderance of evidence the facts necessary to prove its case; and by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which is the most satisfactory and which is entitled to the greatest weight.

REESE BLIZZARD, *United States attorney*, and MONROE C. LIST, *special assistant United States attorney*, for the United States

VAN WINKLE & AMBLER for the defendant.

#### INSTRUCTIONS TO JURY.

DAYTON, *District Judge* (charging jury):

Exercising its constitutional right to regulate commerce between the states, Congress has passed a law which provides:

That from and after the 1st day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars.

That from and after the 1st day of July, 1895, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for the greater security to men in coupling and uncoupling cars.

That any such common carrier using any locomotive engine, running any train, or hauling, or permitting to be hauled, or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed.

This action which you have in charge and are to determine is based upon this statute. There are five counts in the complaint charging five distinct violations of this law. There are three different verdicts that can be rendered by you, one finding the defendant guilty upon each and every count embraced in this complaint; another finding the defendant not guilty of each and every charge embraced in the complaint; and the third, finding the defendant guilty of certain ones of the charges made and not guilty of certain other ones of them. You will therefore see that in considering this matter it is your duty to take up each one of these counts in this complaint, each charge of a violation, and consider it independently of the others, and ascertain whether or not the defendant is guilty or not guilty of that specific charge in that specific instance and count.

The court wants to say to you that the safety-appliance statute makes no exception and places no limitation upon this duty of the railroad company to supply these safety devices to their cars, and when I say cars, it has been considered and held, and rightly so, that an engine and tender are embraced

within that definition. It is therefore the duty of the railroad company to use all reasonable care at all times to discover and remedy these defects when they appear in any of these safety appliances attached to an engine or a car; and if a defect exists at a repair point, or at any place where such defect could have been remedied, and the company moves the car while in the defective condition, it does so at its peril and it becomes then subject to the penalty of the law. The law is not satisfied by the exercise of reasonable care to this end, but the company must, at its peril, discover and repair all defects before moving a car from a repair point. Now, that you may understand that more fully, let me say to you that it is entirely reasonable that a railroad company should be required to maintain repair shops or repair material and make inspections and repairs at places within reasonable distances of each other; that in establishing such repair points the company has the right, in the ordinary operation of their trains between those repair points, when a train is in operation and defects arise, reasonably, to carry the car, the appliances on which are broken or defective, to the first repair point, but they do not have the right, having carried it to that point, to take it beyond that point without discovering and without making the necessary repairs to those safety appliances attached to that car, and if they do carry it beyond that point they are liable to the penalty provided for by this law.

This action is not a criminal action, but a civil one, and as a civil action the burden of proof is upon the Government to establish by a preponderance of evidence the facts necessary to show the violation of the law on the part of the defendant, and by a preponderance of evidence is not meant the greater number of witnesses, but it means that evidence which to your mind is the most satisfactory and is entitled to the greatest weight. The very reason why we have juries to determine the facts in cases like this is that they may judge of the evidence after hearing the witnesses



and that they may take all of the facts and all of the circumstances and weigh them and determine where the very truth lies. Under the ordinary rules of evidence, positive testimony is stronger than negative testimony where that negative testimony is not so strong as to make it apparent that the witnesses stating the positive fact are mistaken or untruthful. Evidence given by witnesses of the very circumstances and surroundings of the matter may frequently be of a determining character and kind. It is your peculiar province to weigh all the facts and all the circumstances and all the testimony and from them as a whole determine, as I have said, wherein the exact truth lies.

Now, I am asked by the defendant to give you this instruction, which I do. Before the jury can find the defendant guilty in this case the Government must prove by a clear preponderance of evidence that the safety appliances on the cars mentioned in the complaint were out of repair and inoperative in the particulars mentioned in the complaint, and unless the Government does establish this by clear and satisfactory evidence, the jury should find the defendant not guilty as to each car which is not thus proved to have been defective.

Gentlemen, it is for you to determine, touching the hand hold on the engine in this case, whether or not the appliance that was testified to by the witness Johnson, at the end or corner of the tender and the release bar, was a fair and proper substitute for the ordinary grab-irons referred to in this statute. If they were suitable for the purpose of enabling the operators of the train to couple and uncouple cars and were a fair substitute and suitable for that purpose, then it would be proper for you to find the defendant not guilty; if they were not suitable and proper for the purpose I have indicated, their presence could not be regarded as a compliance with the provisions of this statute. You will take into consideration the hand holds on the side of the car, in connection with the brace at the end and the release rod along

the end, and if you believe the whole to be a fair equipment and suitable and proper for the purpose of enabling the operators of the train to couple and uncouple cars, then I say it is your duty to find the defendant not guilty on that count; but if they are not suitable for that purpose and not effective for that purpose, then their presence, as I have said to you, upon this tender will not meet the requirements of this law, and of that you will judge from the testimony.

Verdict for Government, 4 counts.

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UNITED STATES *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

(In the District Court of the United States for the Western District of Missouri.)

[173 Fed. 684.]

*Decided February 21, 1908.*

(Syllabus by the court.)

1. The Safety Appliance Act of March 2, 1893, as amended, is a remedial statute and must have such construction as will accomplish the evident intent of Congress. *Johnson v. Southern Pacific Company*, 196 U. S., 1.
2. The placing of a "bad order" card on a car as notice to the employees that the car is defective does not prevent the movement of the car in a defective condition from being unlawful.
3. While the statute is in some aspects penal, recovery of the penalty is had by means of a civil action wherein it is necessary only to prove the facts showing a violation by a preponderance of the evidence.

STATEMENT OF FACTS.

The defendant was charged with having violated the safety-appliance act and an action in debt was brought to recover the statutory penalty of \$100. A jury was waived

and the trial was to the court. The evidence showed that the defendant hauled an Erie coal car with the uncoupling chain "kinked" and wedged in the coupler head on one end of the car. In that condition it was impossible to operate the coupler without a man going between the ends of the cars. One of defendant's engines coupled on to a "cut" of cars in which was this defective car, and hauled it to the yard of the Chicago, Burlington & Quincy Railway Company where a number of other cars were coupled on to the "cut." The entire lot was then hauled by the defendant over to the Chicago & Alton yards where five more cars were attached. One of the defendant's inspectors undertook to operate the coupler in the Union Depot and found the car defective. He then affixed a "bad order" card to the car, indicating the nature of the defect. The car was then taken by the defendant to Armourdale, Kans. The defendant contended that by placing the "bad order" card upon the car, it had complied with the statute and was not liable for the penalty.

ARBA S. VAN VALKENBURG, *United States attorney*; LESLIE J. LYONS, *assistant United States attorney*, for the United States.

FRANK SEBREE, for defendant.

#### OPINION OF THE COURT.

MCPHERSON, *District Judge*:

I find in the Johnson case as reported in 196 U. S., 1, that while the rule of construction as to penal statutes requires such statutes to be strictly construed, yet in the safety-appliance statute the design to give relief was more dominant than to inflict punishment, the act therefore falling within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs. The

rule there laid down is that the statute is to be construed sensibly and as a whole with a view to accomplish the obvious intent of Congress. In that decision the Supreme Court reversed the Circuit Court of Appeals for this circuit, because, as it said, the view of the latter court has been too narrow. The great purpose of the statute was to remedy conditions. That is the point of it.

It is remedial and preventive, and if observed will reduce to a minimum the crippling and killing of railroad employees in this country. As I said yesterday, every one of us can recollect fifteen or twenty years ago that about four times out of five when you went to shake hands with a railroad employee, either a switchman, brakeman, or freight conductor that had been raised from a brakeman you took hold of a crippled hand; fingers gone, sometimes an entire hand or leg gone, because of the extraordinary hazardous business of railroading.

The Supreme Court of the United States upheld the Iowa statute with reference to liability because of the negligence of a co-employ upon the ground that the legislature had the authority to single out the railroad and make them liable for the negligence of a co-employee, while the same would not be liable if applied to a manufacturing plant, solely because of the extremely hazardous business of railroading, placing railroads in a distinct class.

You can scarcely pick up a paper but what you read of some accident to an employee, but it used to be ten times worse. Up in Iowa we do not have one accident now to where we used to have ten. The dockets used to be crowded with work by reason of the number of these accidents, and the percentage has greatly decreased. I do not know how it is in Kansas City, but if it has not decreased, it is on account of the marvelous growth of Kansas City. But I am sure the percentage has decreased.

That is the purpose of this statute, and everyone who has humane views commends this statute. While I suppose, of course, there are no statistics to prove it, I have no doubt

that the enforcement of this statute has been a money-saving proposition to the railroad companies. I have no doubt that the occasional infliction of a small penalty of \$100 prevents many a \$5,000 and \$10,000 judgment.

But it can not be said that the statute was enacted for that purpose. It was enacted for the protection of railroad employees. It is within the knowledge of every one of us that everybody is negligent almost every day of his life. We cross these street-car tracks without a thought in our minds that we are within miles of a track. Sometimes we are reading a paper, or visiting with some friend, and if we are run down we could not recover because of our own gross contributory negligence. In a great percentage of these railroad cases the employees are denied a recovery because of their own negligence. You seldom have a case but what somebody is negligent. If there was no negligence, there would be but few cripples or untimely deaths.

What is the use of putting up a red card on the end of a car, as was done after the United States inspectors spotted the car, except to call the attention of some one to the fact that it needed repairs? That does not stop brakemen from going in there. Men are negligent because they are unthinking for the time being, and some of them have a dare-devil spirit. Any day you can stand in the railroad yards and see a switchman who stands in the middle of the track. The switch engine comes to him. He takes his life in his hands every time he does it, but he steps on the switchboard and looks around for the applause of the crowd about as much as to say, "See my agility." You can not stop that. You can not stop a man from going in between cars by putting a red sign on it, and they will not report it, because they do not care to have the hostility of the company that employs them, and they do not say anything about it unless they get hurt. You and I would do the same.

Now, while this is a penal statute, it has the form of a civil action. There was a time when the courts held in



slander and libel cases where the words used imputed a crime that the proof must convince the court or jury beyond a reasonable doubt, but I understand that the rule has been abrogated. That weight of proof is not required anywhere, except in proving an indictment, and this is not that kind of a case.

Now, this inspection of the 23d was very indefinite and vague. One man has no recollection about it at all. He placed thereon a mark "O. K." The other man has no recollection whatever, except the memorandum in his book. That kind of an inspection will not do. The next thing we know this car is on the way, and my notion about it is that the car would have been taken to St. Louis in that condition if it had not been that these Government inspectors happened along at that time. Now, if these Government inspectors, who in all cases are ex-railroad employees, could see this, why could not this train crew see it? And they would not have seen it when they did if they had not seen these Government inspectors riding this car, and they then supposed something was wrong. The two Government inspectors were on this particular car, so if the train was cut they would still be with the car, I suppose.

Now, here is a case of \$100. If the penalty were extreme, a jury would hesitate more about inflicting the penalty. I would like it better if the same penalty was fixed in these twenty-eight hour cases. I have tried a good many of them, and I have never yet tried one that called for more than the minimum penalty, and I have never inflicted more than that. In most cases there is some substantial reason for delay, and too often a good deal of malice is behind the prosecution, not on the part of the Government officials, but on the part of the shipper. He believes he has been charged a little too much for his hay or grain, or has some other complaint. In nearly every case under that statute that I have tried, I have found that kind of a spirit behind the prosecution. Here is a class of cases where it is impossible to have any malice back of the prosecution. The penalty is

light, and in every case where the proofs are reasonably sufficient, I think it is wise and proper and benevolent to enforce the penalty. And I think it is an act of benevolence to the company itself to see to it that these things are broken up, and thereby lessen the amount they have to pay in personal injury cases. There are many thousand employees in this hazardous business, and I do not think in this case there is any sufficient excuse shown. There is no telling how long that car had been in that condition, and I have no doubt that if these Government inspectors had not been there, that car would have been hauled across the state of Missouri and then to Pennsylvania, and with what result nobody knows.

The judgment will be for the payment of the penalty of \$100, and ninety days for a bill of exceptions will be granted.

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## UNITED STATES *v.* SOUTHERN RAILWAY COMPANY.

In the District Court of the United States for the District of South Carolina.

*Decided February 24, 1909.*

1. A suit under the safety appliance act to recover penalties for violations of said act is civil and plaintiff is required only to prove its case by a preponderance of the evidence.
2. Although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains a car that is loaded with interstate traffic, the act applies.
3. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employees of the defendant of the facts found.
4. The act imposes upon the railway company an absolute duty to maintain its coupling appliance and grab-irons or hand-holds in operative condition.

5. A car coming without the state and being switched from one yard in the state to another yard in the state in furtherance of a design to transfer it to its final destination is engaged in interstate traffic.

ERNEST F. COCHRAN, *United States Attorney*, and ULYSSES BUTLER, *special assistant United States Attorney*, for plaintiff.

JACOB MULLER for defendant.

#### INSTRUCTIONS TO JURY.

BRAWLEY, *District Judge* (charging jury):

The Court is requested by the learned counsel for the plaintiff to give you these instructions:

1. This is a civil case and the Government is only required to prove its case by a preponderance of the evidence and not beyond a reasonable doubt. *United States v. L. V. Ry.* (not yet reported), District Court; *United States v. P. & R. Ry.* 162 Fed. Rep., 403; *United States v. Chicago Great Western Ry.*, 162 Fed. Rep. 775; *United States v. B. & O. Sun. R. (C. C. A.)*, 159 Fed. Rep., 133. Granted.

2. If the jury find that the defendant hauled a car which was defective in not complying with the safety-appliance law as to coupling appliances, or grabirons, or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train that contains a car that is loaded with interstate traffic, then the act is violated, even though the car which contains the interstate traffic may not itself be defective. *United States v. L. & N.*, 162 Fed. Rep., 185 (District Court); *United States v. Chicago Great Western Ry.*, 162 Fed. Rep., 775 (District Court); *United States v. Wheeling & L. E.* (not yet reported), District Court. Granted.

3. Whenever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun and does

not cease till the car has arrived at its point of final destination. *The Daniel Ball*, 10 Wall., 557; *United States v. Belt Ry.* (not yet reported), District Court. Granted.

4. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employes of the defendant, when they make the inspection of the cars sued upon, of the defects found in the appliances; the jury should not discredit their testimony because the inspectors did not so inform the employes of the defendant. *United States v. Chicago Great Western Ry.*, 162 Fed. Rep., 775. Granted.

5. The safety-appliance law of Congress imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances and grabirons or handholds in operative condition, and it is not satisfied by the exercise of reasonable care to that end. *St. L., I. M. & S. v. Taylor*, 210 U. S., 281; *United States v. A. T. & S. F. Ry.* (C. C. A.), 163 Fed. Rep., 517; *United States v. D. & R. G. R.* (C. C. A.), 163 Fed. Rep., 519; *United States v. P. & R.*, 162 Fed. Rep., 403. Granted.

The court is requested by the defendant to give you certain instructions:

1. This being a suit by the Government to recover a penalty the rules of criminal procedure and evidence may apply, and the defendant is presumed to be innocent of the violations of law charged against it until it is proved to have been guilty beyond a reasonable doubt.

COURT. The court refuses that instruction. The rule is this: This is a civil action to recover a penalty, and as in all civil cases the plaintiff must establish his case by clear and satisfactory evidence, and the jury must determine, if there is testimony on either side, by the preponderance of the testimony, the careful weight of the testimony.

2. As regards any material issue of fact in this case, if the jury have any doubt they should solve such doubt in favor of the defendant.

COURT. The court can not give you the instruction in that form. That is disposed of by what the court says in

refusing the first instruction. They must establish it by the preponderance of the testimony. If you have any doubt as to the preponderance of the testimony, then the plaintiff can not recover.

3. In a suit by the Government under the safety-appliance acts to recover a penalty for an alleged violation of the law by a railway company, these acts can not be regarded as imposing upon the railway company an absolute duty in the sense that it becomes penally liable for a violation of the law without regard to the question of intent or the question of diligence on the part of the company to avoid such violation. Refused.

4. If a violation of these safety-appliance acts by a railway company is unintentional and unavoidable on the part of the company, it is not liable to the penalty prescribed by the acts.

COURT. The court can not give that instruction. The question of intention does not come into play at all.

5. The jury in this case can not find a verdict for the plaintiff in this action for any other defects than those alleged in the complaint to have been defective.

COURT. The court gives you that instruction, but in construing the complaint you must give to it fair and reasonable interpretation.

6. If the jury have a reasonable doubt as to whether the cars alleged in the complaint to have been defective were in fact defective as alleged in the complaint, they should find a verdict for the defendant. Refused.

7. If the court refuses No. 6, then the burden of proof is on the plaintiff in this case, if in the minds of the jurors the evidence on any issue of facts is evenly balanced between the plaintiff and the defendant, they should resolve that issue in favor of the defendant. Granted.

8. Within the constitutional meaning and extent of the safety-appliance acts, it can not be considered that a car whose destination is a point without the state is being used in interstate commerce when being shifted from point to



point in a railway yard by a shifting engine within the state, and is not in the course of an extended movement beyond the limits of the state.

COURT. The court interprets that instruction as intended to apply to the movement of a car containing coal, which had been brought from some point in Tennessee and was intended for some point in the state of Georgia, and which was moved from one of the yards of the company to another yard of the company. If you find the fact to be that that car had been engaged in interstate commerce and had come from a point in Tennessee, and was shifted to another yard of the defendants in furtherance of the design to have it transferred to a point in Georgia, then it was interstate commerce within the meaning of the law. As to the defect in the engine, the court instructs you that if when the shifting engine began the movement of that car from one yard to the other, that engine was in good condition, the coupler was in a safe condition, and not defective, and if in the transit between the yards it became defective, then the company would not be liable, if they repaired the defect as soon as possible. All mechanical appliances are liable to get out of order in the use, and all that the company can fairly be required to do is to see that when the cars began to move, when the engine began to move, that all of the appliances were perfect, and if in the course of the movement, as the result of the movement it became defective, then the act would not apply to it, provided the company repaired it before moving again.

9. The interstate transportation by a railway company of its own property is not "interstate commerce."

COURT. The court must refuse that instruction in that shape. It will instruct you that if the car referred to, containing sand, was being moved from South Carolina into North Carolina for the company's own purposes, if it was carried on a train which was engaged in interstate commerce, and this car was defective, it falls within the denunciation of the statute still.

UNITED STATES v. ATLANTIC COAST LINE RAIL-  
ROAD COMPANY.

In the District Court of the United States for the District of South  
Carolina.

*Decided February 24, 1909.*

1. A suit under the safety-appliance act to recover penalties for violations of said act is civil and plaintiff is required only to prove its case by a preponderance of the evidence.
2. Although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains a car that is loaded with interstate traffic, the act applies.
3. The act imposes upon the the railway company an absolute duty to maintain its coupling appliances and grab-irons or handholds in operative condition.
4. Whenever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun and does not cease till the the car has arrived at its point of final destination.
5. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employees of the defendant of the defects found.

ERNEST F. COCHRAN, *United States Attorney*, and ULYSSES BUTLER, *special assistant United States attorney*, for plaintiff.

B. A. HAGOOD and L. W. McLEMORE, for defendant.

BRAWLEY, *District Judge* (charging jury):

Counsel for the Government has requested the following instructions:

1. This is a civil case and the Government is only required to prove its case by a preponderance of the evidence and not beyond a reasonable doubt. *United States v. L. V. Ry.* (not yet reported), District Court; *United States v. P. & R. Ry.*, 162 Fed Rep., 403; *United States v. Chicago Great*

*Western Ry.*, 162 Fed. Rep., 775; *United States v. B. & O. Sun. R.* (C. C. A.), 159 Fed. Rep., 33.

COURT: The court gives you that instruction. In other words, you will decide this case as you would any other civil case, and not as in criminal cases, where the Government must make out its case beyond a reasonable doubt. You must decide it by the preponderance of the evidence.

2. If the jury find that the defendant hauled a car which was defective in not complying with the Safety-Appliance Law as to coupling appliances or grab irons or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains a car that is loaded with interstate traffic, then the act is violated, even though the car which contains the interstate traffic may not itself be defective. *United States v. L. & N.*, 162 Fed. Rep., 185 (District Court); *United States v. Chicago Great Western Ry.*, 162 Fed. Rep., 775 (District Court); *United States v. Wheeling & L. E.* (not yet reported), District Court. Granted.

3. Whenever a car is loaded in one state of the Union with a commodity which is destined for another state, and begins to move, then interstate commerce has begun, and does not cease till the car has arrived at its point of final destination. *The Daniel Ball*, 10 Wall., 557; *United States v. Belt Ry.* (not yet reported), District Court. Granted.

4. Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employes of the defendant, when they make the inspections of the cars sued upon, of the defects found in the appliance: the jury should not discredit their testimony because the inspectors did not so inform the employes of the defendant. *United States v. Chicago Great Western*, 162 Fed. Rep., 775. Granted.

5. The safety-appliance law of Congress imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances and grab-irons or handholds in operative condition, and is not satisfied by the exercise of

reasonable care to that end. *St. L., I. M. & S. v. Taylor*, 210 U. S., 281; *United States v. A., T. & S. F. Ry.* (C. C. A.), 163 Fed. Rep., 517; *United States v. D. & R. G. R.* (C. C. A.), 163 Fed. Rep., 519; *United States v. P. & R.*, 162 Fed. Rep., 403. Granted.

6. You are instructed that if you believe from a preponderance of the evidence that the defendant hauled the cars, as alleged in the first, second, third, fourth, fifth, sixth, seventh and eighth counts of plaintiff's petition, when said cars were not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of a man going between the ends of the cars, or was not equipped with secure handholds, or with a grab-iron, then your verdict should be for the Government. *United States v. Nevada County N. G. R.* (not yet reported), District Court.

COURT: That seems to be already embraced in the previous instruction: the court gives you that instruction.

COURT: Mr. Foreman and gentlemen: The Government has offered testimony tending to show that 9 cars went out from Florence on February 19 of last year in a defective condition, and the inspectors for the Government, whose duty it was to look after these matters, testified as to the nature of those defects and that they saw the cars moving out, and that they were engaged in interstate commerce. The defendant company has offered testimony tending to show that the inspector employed by the company, whose duty it was to make repairs within the car-repair yard, repaired at least 7 cars, or had it done under his direction, and that the cars alleged by the Government's witnesses to be defective were not in point of fact defective in the particulars referred to. Now, it appears from the testimony that the inspectors made their presence known to the yardmaster of the defendant company when they arrived at the yards, some time in the morning, and they have given you the days and hours when they made their inspection of the cars. If you believe their testimony, the cars were defective at the time

they examined them; whether the defects were repaired afterwards, after the government inspectors saw them and before they went out, is a question for you, and the credibility of the witnesses is a question for you. The fact that the government inspectors did not inform the employes of the company of the fact that they found these defects is not to be taken by you as any reason for discrediting their testimony. The law does not require them to make such report. The fact that they were on the ground—were known to be there by the yardmaster—is a circumstance to be considered by you in determining whether or not that fact would or would not make the railroad parties more than usually vigilant on such an occasion, put them on their guard, the inspectors being there, going about and looking at the cars, whether or not that fact was not likely to make lazy people in charge of the yards take extra precaution to see that the cars in the yard were in proper condition, is a circumstance. Now, on behalf of the Government it is contended that even if the repairs proved to have been made by the witness, Summerford, car repairer, even if he made the repairs which he testifies to, that they were not the defects that the Government's witnesses have pointed out. That is a question of fact for you, which you must determine by your recollection of what the witnesses for the Government have testified to on that subject. Of course, if they made other repairs than those which the Government alleged were the defects, that would not relieve the company, but if the specific defects which the testimony of the government inspectors pointed out, if they were not repaired before the cars left, of course the company is liable. The company has no record of any repairs made upon cars named in the first and ninth causes of action, and if you believe the testimony of the government inspectors that those cars were defective in the particulars pointed out, it would be your duty in that case to find a verdict for the Government upon those 2 cars. As to the 7 other cars, it depends entirely upon your conclusion as to the testimony on the point whether or not those cars



were repaired before they went out. If they were, why your duty would be to find a verdict for the defendant; if they were not, it would be your duty to find a verdict for the plaintiff in the full amount claimed by them. If you find for the Government you will find so many dollars; if you find for the Government as to the whole amount then you will find for the Government \$900. If you find for the defendant you will say: "We find for the defendant." If you find that 7 of the cars were repaired before they went out, you will find in any event \$200.

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(United States Circuit Court of Appeals, Sixth Circuit.)

THE UNITED STATES OF AMERICA, *Plaintiff in error*,  
v. THE ILLINOIS CENTRAL RAILROAD COM-  
PANY, *Defendant in error*.

[170 Fed. 542.]

Error to the District Court of the United States for the Western District of Kentucky.

(Submitted January 13, 1909. Decided March 2, 1909.)

1. An action by the Government to recover a penalty under the safety-appliance act is a civil action with all the incidents of a civil action.
2. From an adverse judgment in the District Court the United States may have a writ of error to the Court of Appeals.
3. If a railroad company starts a car in transit with a coupling so defective that the defect could have been discovered by inspection it will be liable under the safety-appliance act; but if a car when started in transit had no discoverable defect, the company will not be liable for the use of the car in that transit for a defect occurring during such transit, if there has been no subsequent lack of diligence either in discovering or repairing the defect.
4. When the Government has proven a car was laden with interstate commerce, has defective couplings, and was hauled over the

defendant's road, the defendant has the burden to show that it used all reasonable possible endeavor to perform its duty to discover and correct the defect.

5. The statute does not require the railroad company to have its cars properly equipped at all times and under all circumstances when in use, in order to escape a liability to a penalty.

Before SEVERENS, *Circuit Judge*, and KNAPPEN and SANFORD, *District Judges*.

SEVERENS, *Circuit Judge*, delivered the opinion of the Court.

This is an action in the nature of a common law action of debt brought in the District Court by the United States against the Illinois Central Railroad Company to recover penalties of \$100 each for twenty-two alleged infractions of Section 6 of the Safety Appliance Act of March 3, 1893, each offense being set out in a separate count. Some of these counts were for hauling cars in inter-state traffic with defective automatic couplings, some with defective grab-irons and some with draw bars not on the proper level above the track. There was a plea of not guilty to each count, and special matters of defense were alleged in the several answers. The issues were tried by a jury. A stipulation as to certain facts was made by the attorneys for the parties and filed, of which the following is a copy:

"Defendant, for the purpose of this case, admits:

"1. That it is a corporation doing business in Illinois and Kentucky, and is a common carrier, transporting over its railroad in Kentucky, both cars carrying inter-state commerce and cars carrying shipments wholly intra-state.

"2. That in each of the cars in paragraphs 1, 5, 6, 7, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21 and 22 contained inter-state shipments; that each of the cars mentioned in paragraphs 4, 9 and 13, transported shipments purely intra-state, i. e., from one point in Kentucky to another point in Kentucky, and that each one of said cars was hauled by defendant in a train in which there was at least one other

car that at the time contained an inter-state shipment; and that the engines mentioned in paragraphs 2, 3 and 8 were used by defendant wholly between points in Kentucky, to-wit: Between Louisville and Central City, and that said engines hauled trains at the times mentioned in said paragraphs 2, 3 and 8 composed of cars, some of which contained traffic purely intra-state, and each one of which trains contained the car mentioned in said paragraphs respectively containing inter-state freight."

Evidence bearing upon the issues was adduced by the parties, and the jury having been instructed by the Court, rendered a verdict for the plaintiff on seven of the counts in the sum of \$100 each, and for the defendant on the other fifteen.

The plaintiff brings the case here on a writ of error. The first question arises upon a motion to dismiss the writ upon the ground that the proceedings in the Court below were essentially of a criminal nature, and that the United States cannot have a writ of error upon proceedings of that description. It seems proper to advert to certain fundamental considerations upon which the procedure in such cases as this rests, and upon which the determination of the question here raised depends.

It is urged by counsel for the defendant that the punishment prescribed by the sixth section of this Act is a penalty, that the proceeding for its enforcement is criminal in its nature, and that therefore the trial of the cause is to be governed by the rules of evidence, and the right to have a review in an appellate court is to be determined by the law applicable to a criminal prosecution. It may be admitted that in a sense the punishment prescribed by the Act is a penalty. But penalties are of different sorts. They may consist of a sum of money which the offender shall pay in atonement for his forbidden act, in other words, of a fine, or shall suffer some other form of forfeiture of property, or they may consist of the infliction of the corporal punishment of the guilty party, or they may

consist of both of these punishments. The public through its government may employ, within certain limitations, such of these various forms of punishment as it may deem just and necessary to the common welfare. Offenses range in respect of their turpitude from the smallest to the greatest; and the theory of punishment is that it shall be measured by the gravity of the offense. While it is true that the constitution and laws of the country are prescribed and enforced for the protection of property as well as of the person, yet they regard with greater concern the protection of the latter. And so, when for small offenses a pecuniary punishment is prescribed as the atonement, it has long been the practice to employ a civil action for its recovery. Assuming that the punishment is just, the consequences to the defendant are not far different from those which happen in civil actions, only it is the government which is the plaintiff. The consequences of the judgment are substantially the same to him as if the penalty was bestowed upon a private party, except with regard to the scintilla of interest he has in the public revenue. If the public may, for a sufficient reason, compel the defendant to pay a fine, it is of little importance to him whether the government keeps it for its own purposes or turns it over to another who is already indemnified. Mere academic discussion of the theory of the practice by which it is done does not interest him. Probably in all the systems of law in the State and Federal governments, there are instances where to civil liabilities there are attached penalties, there being something wanton or gross or otherwise peculiar to the liability. Yet such penalties are enforced in civil actions.

A very cogent, not to say persuasive, argument was addressed to us, founded upon the prohibition of the Constitution against subjecting a person to be twice put in jeopardy for the same offense. It is urged that this prohibition extends to a review of the trial in an appellate court; and, further, that it applies not only to prosecutions for crimes, but to prosecutions for misdemeanors also.

And we must suppose that it is thought that the protection afforded thereby extends as well to artificial as to private persons; for the defendant here is a corporation. And if a private person may invoke it in a case when only the forfeiture of property is involved, there is color for the claim that a corporation may invoke it in a like case. This seems to us to be pushing the doctrine a long way and beyond its hitherto recognized scope.

We held in *United States v. Baltimore & O. S. W. R. R. Co.*, 159 Fed. 33, 38, and again the case of *United States v. Louisville & Nashville R. Co.*, recently decided, that the Government was entitled to prosecute a writ of error from this court to the District Court to review the proceedings in an action of debt to recover a pecuniary penalty which alone was the punishment prescribed. To this ruling we adhere. The result is that the motion to dismiss must be overruled.

The principal questions upon the merits are two, and they arise upon the instructions given by the Court to the jury.

1st. Whether on the trial of an action such as this, the rule of the criminal law that the evidence must satisfy the jury of the guilt of the respondent beyond a reasonable doubt, applies.

2nd. Whether the judge correctly stated the law to the jury when he said (as he did in substance) that if the defendant equipped the cars with the proper appliances as required by the Act, and thereafter exercised the utmost degree of care and diligence in the discovery and correction of defects therein, which could be expected of a highly prudent man under similar circumstances, it would have discharged its duty, and would not be liable to the penalty prescribed by the statute.

Respecting the first of these questions, we have little to add to what we said in *United States v. Baltimore & O. S. W. R. Co.*, *supra*, and the observations already made in discussing the motion to dismiss the writ of error. It is



impossible for us to distinguish this case upon any substantial ground, so far as concerns the present question, from that of *Zucker v. United States*, 161 U. S. 475, where on the trial of an action by the United States to recover the value of merchandise forfeited by a fraudulent importation, the case turned upon the admissibility of certain evidence. If the action was of a criminal nature, it was inadmissible. If it was not, it should have been received. The question was much discussed by Mr. Justice Harlan, and the result was that the Court held that the evidence should have been received, and this upon the ground that it was not a criminal proceeding.

We have referred to instances where, in the enforcement of civil liabilities, penalties incurred by wrongful neglect to discharge them are also enforced; and yet we are not aware that it has ever been supposed that the rule of the criminal law respecting the degree of proof was to be imported into the trial of the civil action. The giving of such a remedy as that specified by the sixth section, without any restriction or condition, imports an action at law with the customary incidents of such an action. Being a remedy which does not touch the person, there is no such urgency for protecting him as to require that the rules for the conduct of a civil suit should be displaced, and those of a criminal proceeding be taken in. We think the law does not sanction such an anomalous compound in legal proceedings. If, indeed, there be no substantial distinction between a case where the Government retains the fine and one where it is given to a private party in excess of his otherwise legal right, there are decisions in point which hold that where the suit is a civil action for a penalty the evidence is sufficient if it preponderates, and need not be such as to remove all reasonable doubt.

*Roberge v. Burnham*, 124 Mass. 277.

*O'Connell v. Leary*, 145 Mass. 311.

*Louisville & N. R. Co. v. Hill*, 115 Ala. 334.

*People v. Briggs*, 47 Hun. (N. Y.) 266.

We are therefore of the opinion that the court erred in its instruction to the jury in this regard.

As the judgment must be reversed for the error above shown, we think it necessary to consider and dispose of the other allegations of error above stated, to the end that the court below may not be vexed with the same questions, which as seems quite certain, will arise upon the new trial. The trial of so many causes of action upon one petition creates as it did for the court below some embarrassment in dealing with the questions which arise upon the several counts of the petition. Moreover, upon the new trial the evidence may not be the same as that given on the first. Evidence of new facts may be adduced, which as we should think, would be desirable in order to make proper conclusions upon the merits of the several cases included in the petition. We shall best subserve the present purpose, by indicating the general principles by which in our opinion the trial should be governed in respect to the subject we are now considering.

The instruction given to the jury in regard to the measure of the duty imposed upon the railroad company by the provisions of the Safety Appliance Act was in the main, but not altogether, substantially in accord with the construction which we gave to them in the case of *St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931. It is urged however, by counsel for the Government that our opinion in that case has been overruled by the opinion of the Supreme Court in the case of *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281. If this seemed to us with certainty to be so, we should of course be bound to yield our own opinion to the superior authority of that court. But if the judgment of the Supreme Court has not concluded the questions now presented, we think the duty incumbent upon this court is to follow its own decision unless, indeed, it should become convinced that it was wrong. Thereupon, it will remain for the Supreme Court to determine whether the ruling it has

announced is to be extended to facts such as those of the present case.

The question recurs to what extent is a judgment of a superior court of controlling authority? We do not allude to that respect and confidence which is always due to every expression of opinion of the superior court from the subordinate court, but to those declarations of essential import resting upon the facts and leading to the conclusion manifested by the judgment. Declarations of law bearing upon the issues and indicating the proper judgment thereon are binding. The facts and law of the instant case only are in the eye and thought of the court. But expressions of opinion as to how the law would be upon facts essentially different from those in issue are not controlling in another case when such different facts and issues are presented. These rules have been declared on many occasions by the Supreme Court itself, and no appellate tribunal has more strongly emphasized them.

*Cohens v. Virginia*, 6 Wheat. 264, 399.

*Northern Bank v. Porter tp.*, 110 U. S. 608.

*Plumley v. Massachusetts*, 155 U. S. 461, 471, 474.

*Hans v. Louisiana*, 134 U. S. 1.

*United States v. Wong Kim Ark.*, 169 U. S. 649, 679.

*Harriman v. Northern Securities Co.*, 197 U. S. 244.

*Downes v. Bidwell*, 182 U. S. 258.

In the case of *St. Louis &c. Ry. Co. v. Taylor*, *supra*, the suit was an action to recover damages for a personal injury, and not a penal action such as provided by Section 6. It was found upon the provisions of those sections of the act which relate to the subject of equipping the cars and was not a prosecution for the use of such cars. Besides it appeared in Taylor's case that only one of the meeting ends of the cars which came into the collision whereby he was killed, was equipped with an automatic coupler, and that the end of the draw-bar on the other car was not so equipped but had the old style of link and pin

coupling. This latter fact was a plain violation of the law which necessarily meant that both the meeting ends should be equipped with the automatic coupling; otherwise there would be no coupling which would be automatic.

We gather from the facts stated in the opinion in the Taylor case that the defect in the couplings of cars existed when the cars started on their journey, and that plates of metal, called "shims," were provided for temporarily remedying the inequality in the height of the draw-bars. If that was so, the railroad company was chargeable with notice of the defective condition of the draw-bars when the cars were sent out and was at fault in not putting them in order, and did not relieve itself by trusting to its employes the making of the temporary makeshifts.

Whether the Supreme Court would apply the rule laid down in the Taylor case to an action brought by the Government for a penalty under section 6 of the act we do not know. While we have held that in giving an action of debt to recover a penalty, the implication is that the procedure, the pleading, the evidence, and the review of the proceedings are to be such as are incident to an action of debt, a question of much importance remains which is whether the offense being penal, the court is not to have regard to the constituents of the offense itself, and determine its quality by the tests of the criminal law. In other words, does the mere fact that the remedy is a civil action relieve the Government from proving that the offense charged was criminal in its nature and, specifically, was committed in willful neglect of the duty prescribed by law? The distinction between a remedy and the cause of action is clear enough, but the answer, notwithstanding anything decided in Taylor's case, is doubtful. Though involved in the case before us, the question has not been raised or discussed. We incline to think it should be answered in the negative, but we do not decide it.

This case was tried before the decision of the Delk case. But the opinion of the court as expressed in its instruc-



tions to the jury, in most respects, proceeded along the lines of our opinion in the case alluded to. In this latter case the facts were that the car, on which were the defective couplings, had been sent back by the Belt Line because of the defect. It had been on the dead track in the yard to await repairs, which had been sent for, and was in the midst of other cars. It became necessary to move the defective car along the track in order to release and get out the other cars. It was during this operation that the plaintiff was hurt. There was evidence from which the jury might have found that the first knowledge which the defendant had of the defect in the coupler was when the car was sent back to it and it put the car on the "dead track" for repairs, and that it had done nothing toward actually promoting the transit of the car toward its destination. It was for the time being "tied up" for repairs. Still, as the majority of the court held, it was nevertheless engaged in interstate commerce, its freight not having yet been discharged. What we said in our opinion had reference to a case so circumstanced. We were not engaged in laying down universal rules upon the general subject, but only such as we conceived to be applicable to the facts of the case then before us. In effect we concluded that if the defect had occurred at some previous time and the defendant had knowledge of it, or should, with reasonable diligence, have had notice of it, and with such knowledge, actual or implied, continued without some justifying necessity, to haul the car upon its tracks while laden with goods which were the subject of interstate traffic, it would thereby violate the statute. We still concede that to be so. We think, further that the railroad company would be liable if it starts in transit a car with a coupling containing a defect which could have been discovered by inspection; and *vice versa*, if a car when started in transit had no discoverable defect, the railroad company would not be liable to the penalty for a use of the car in the same transit by reason of a defect occurring during transit, pro-



vided there has been no subsequent lack of diligence either in discovering or in repairing the defect.

We are of the opinion that when the Government has proved that a car laden for interstate traffic and with defective couplings, has been hauled upon its tracks, the railroad company is bound to prove exculpatory facts, such as that it has used all reasonably possible endeavor to perform its duty to discover and correct the fault. We think, for example, that the court was in error in charging the jury that in the case of the cars coming from Mound City the jury might indulge the presumption that the appliances of the cars were in proper condition when they started, and that they remained so until such time as they were shown to be otherwise. We think the burden of proof was on the other party.

With regard to the sufficiency of the proof in view of the fact that the action is a civil-action and is for a penalty, we have already expressed our opinion.

Now, as an original proposition we are unable to understand why it was, if Congress intended to enact such a law as it is now contended this law is, it should, after having proposed to itself the enacting a law "to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers" and having used fitting language to carry that purpose into effect and nothing more, have failed to declare that having so equipped its cars with the couplings, the carrier should be required at all times and in all circumstances when in use to have them in effective condition. To hold that Congress has done this, is to insert an interpolation into the act, and to make this interpolation such as shall require things confessedly impossible and to be apologized for by saying as counsel for the Government insist that we should, the law is so written, that it is a matter for the legislature, and not for the courts to determine. Is this a proceeding to be justified in order to make the statute mean what the coun-

sel think the law ought to be? It seems clear to us that Congress having accomplished its purpose by requiring carriers to equip their cars in the manner prescribed and to continue such equipment, was content to leave the incidents of their use to be regulated by the rules and principles of the common law.

Generally, the accepted rule is that if a given construction of a law leads to such results that it seems harsh, unreasonable or to be performed with a great excess of difficulty, the court on seeing such a prospect will turn back to see if a construction is possible whereby such consequences can be avoided and another construction imposed having a more reasonable result. Such an act, we think, ought not to be so construed as to imply the intention to impose these consequences, unless its provisions are such as to render the construction inevitable. A time honored rule for the interpretation of statutes forbids it. Said Mr. Justice Field in delivering the opinion of the Supreme Court in *United States v. Kirby*, 7 Wal., 482; "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislation intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." This statement has been repeated by that court in numerous cases since that time; the latest being perhaps that of *Jacobson v. Massachusetts*, 197 U. S. 11. It is the opposite of this to recognize a hardship, an injustice, and then to fortify the way to it by adopting the fatalistic answer, "thus saith the law." And it is, indeed, worse than this if the law does not say it at all. It is to assume the conclusion, and then mould the premises so that they may justify the conclusion. Accidents will happen, and at places more or less remote from places of repair, or where the car cannot be left upon the track without peril to the

public as well as to the employes. Undiscoverable defects may at any time appear while the car is moving on the track in a train, and it has been hauled in that condition before it can be known. We are not prepared to believe that Congress intended to impose a law upon a business of public utility which cannot be carried on without more or less frequent violations of such law, and to fasten thereon a liability to prosecution as for a crime or misdemeanor?

Among the Fundamental Legal Principles, Broom in his Legal Maxims, 238, classes the maxim, *Lex non cogit ad impossibilia*, a rule of law which applies to statutes of the most positive character, statutes which cannot by any rule of construction be so interpreted as to prevent the certainty of the result. And in his commentary upon it he says; "The law in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases."

While this maxim is not uniformly applicable, as for instance when the statute relates to a dangerous business and gives a private remedy, we think it is a proper one to apply in the construction of a law inflicting a penalty, and the business to which it relates is not itself unlawful.

It was upon the application of this maxim that the case of *Chew Heong v. United States*, 112 U. S. 536, was decided. The Chinese Exclusion Acts of 1882 and 1884 forbid the re-entry of a Chinese laborer without the production of the collector's certificate which by these Acts he should obtain on leaving the United States.

But he had left prior to the date of the Acts, and so of course could not have obtained the certificate. By the treaty with China of 1880, being resident here he was entitled to go abroad and return without hindrance or condition. Congress, however, had the power to pass laws in derogation of the treaty. But although the denial of the right to return without the certificate was peremptory, the

court held that in this, the Act required an impossibility, and for the purpose of saving the right given by the treaty, it was to be presumed that Congress did not intend its prohibition to be absolute, and that the Statutes should be so construed as to avoid an unreasonable or unjust result.

On the argument, counsel for the Government when asked what language of the act created the absolute duty contended for, referred to the last clause in Section 2 which is, "and which can be uncoupled without the necessity of men going between the ends of cars," as if that language constituted an independent requirement. But this language is descriptive of the equipment required, and imports nothing in regard to the duty of the carrier when from accident or some other cause without his fault, the equipment becomes deranged. And because the statute does not make any command in that regard, the general law supplements the duty of the carrier by declaring that he shall use the utmost diligence in having the defect corrected. By this harmonious cooperation of statute and common law, the intended result is worked out without any unjust result.

The court is not at this time made up of the same members as it was when the Delk case was decided, but all are agreed that the decision was right as applied to a defect occurring during transit and that so applied we should abide by it unless it shall be overruled by the Supreme Court. Still, if it should be held that our decision in the Delk case was wrong, it does not necessarily follow that in this suit for a penalty the court below was also wrong in giving the instruction complained of.

The result of these considerations is that for the error in the instruction regarding the sufficiency and cogency of the proof required, the judgment must be reversed and a new trial awarded.

## UNITED STATES v. WABASH RAILROAD COMPANY.

(United States District Court, Southern District of Illinois.)

[Affirmed, 168 Fed. 1.]

June 6, 1907.

1. The Safety Appliance Act requires that each coupler on a car be operative in itself, so that an employee will not have to go to another car to uncouple the car in question.

WILLIAM A. NORTHCOTT, *United States Attorney*, HENRY A. CONVERSE, *assistant United States attorney*, and LUTHER M. WALTER, for the United States.

MCANULTY & ALLEN, for the defendant.

HUMPHREY, *District Judge* (charging jury):

The case you are considering is a suit brought by the Government of the United States against the Wabash Railroad Company for the enforcement of a penalty. There is a law of Congress, passed several years ago, and amended in some instances since, requiring interstate railroad companies to equip their cars with certain appliances for the safety of train crews. We call it the "Safety Appliance Act." And the same Act fixes a penalty for every violation of that statute, for every failure of the railroad company to comply with the statute, for every instance of taking into its service and using cars not so equipped, or having such equipment not in good operating condition.

During the progress of this case, as the witnesses have testified, you have learned what these various appliances are. Air brakes upon at least 75 per cent. of the cars in a train, so connected that such cars so equipped would be under the control of the engineer; couplers equipped in such a way that, by a device handled from the side of the car, cars can be coupled or uncoupled with cars to which they may be attached in the train without the necessity of a member of the train crew going between the ends of the two cars.



This declaration has seventeen counts—a separate count for each alleged violation. Some of these counts charge upon insufficient air brakes; others charge upon lack of grab-irons or defective grab-irons; others charge upon defective couplers and coupling devices.

You will have the declaration with you, and the evidence has made you familiar with what I mean when I refer in this casual way to these various devices.

Now the Government will be entitled to a verdict of guilty in this case as to those counts in which it has proven by a preponderance of the evidence that the cars were in use at the time in question in violation of the statute. There is no dispute, I think, shown by this record as to the fact that all these cars and trains counted upon were in interstate business, so that the issue you are trying upon each count is an issue of fact pure and simple, whether the cars so in use, or the trains so in use, were being used in violation of these statutory requirements.

And, if you find from the evidence, from a preponderance of the evidence upon any one of these counts, that there was a violation of the statute as charged in such count, then as to such count you will find the defendant guilty.

On the other hand, if you find as to any one of these counts that there was no violation of the requirement of the statute as to such particular count, find this from a preponderance of the evidence, then as to such count or counts you will find the defendant not guilty.

You will have nothing to do with the punishment in the case. Congress has fixed that specifically in the Act itself, and the court will enforce the punishment upon your verdict of guilty or not guilty, as to each count.

In making up your minds upon the evidence, the court further charges you that by a preponderance of the evidence I mean the greater weight of the evidence, the convincing power of the evidence; not the number of witnesses, not anything else except that indescribable something which convinces a man of the truth of a fact, that gives weight to

evidence. In considering these witnesses who have testified, you have a right to consider all that you have seen and all that you have heard as coming from the witnesses, their manner and appearance upon the stand, their frankness and honesty, or the lack of it, their interest in the case, if any has been shown, or their prejudices, if any have been shown, the reasonableness or unreasonableness of the story they have told, and whether they have contradicted themselves or been contradicted by other reliable testimony in the case. All these considerations you have a right to weigh in making up your judgment as to the weight to be given to the testimony of any witness, but in doing this you will not give either more or less weight to the testimony of any witness because of the fact that such witness testifies on behalf of the Government, or because of the fact that such witness is an employee of the railroad company, but you will give to the testimony of each witness that degree of weight which, in your judgment, it is entitled to, from all facts and circumstances in the case.

The statute concerning the coupling devices requires that the automatic coupler in use must be operative for each car as to the device of that particular car, so that an employee of a railroad company would not have to go to another car to make the uncoupling of the car in question. The jury will take that into consideration in connection with the other evidence in the case. \* \* \*

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## UNITED STATES *v.* BELT RAILWAY COMPANY OF CHICAGO.

(United States District Court, Northern District of Illinois, Eastern Division.)

[Affirmed, 168 Fed. 542.]

January 23, 1908.

(Syllabus by the court.)

1. An intrastate belt railroad which accepts for transfer between different trunk lines cars loaded with interstate traffic is subject to the Safety Appliance Act even though its rails lie wholly within the confines of a single State.

2. Interstate commerce begins as soon as an article starts to move from one State to another, and every carrier conveying it is engaged in moving interstate commerce.

EDWIN W. SIMS, *United States attorney*, HARRY A. PARKIN, *assistant United States attorney*, and LUTHER M. WALTER, *special assistant United States attorney*, for the United States.

WILLIAM J. HENLEY and WILLIAM L. REED, for the defendant.

LANDIS, *District Judge* (charging jury):

This is a suit by the United States against the Belt Railway of Chicago for the recovery of a penalty of \$100 for the movement of a train made up of 43 freight cars, of which less than 75 per cent. had their brakes used and operated by the engineer of the locomotive drawing the train. The Act of Congress controlling this situation provides that every common carrier engaged in interstate commerce shall have not less than 50 per cent. of the cars composing a train equipped with brakes so as to be operated by the engineer of the locomotive drawing the train. The Act also authorizes the Interstate Commerce Commission to increase the minimum percentage of cars in any train required to be so operated, and provides that failure to comply with such requirement shall be subject to penalty.

Prior to the date on which the movement under inquiry in this proceeding took place, the Commission, in the exercise of this authority, had taken such action that on the day this movement took place it was the duty of the defendant, in the operation of its train, to use power or train brakes on not less than 75 per cent. of the cars composing the train.

It appears in evidence that the defendant's train was made up of 43 freight cars, including C., R. I. & P. car 85176 and an engine and caboose, and that the car mentioned contained lumber under shipment from a point in Illinois to a point in Wisconsin; it also appears that power or train brakes were used on but 15 cars composing this train, and that on

the remainder of the cars being the difference between 15 and 43, the power or train brake was not used.

The question, therefore, presented is whether the Belt Railway Company, at the time of the movement of the train, was engaged in interstate commerce; and on this point I charge you that when a commodity originating at a point in one State, destined to a point in another State, is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination. If, therefore, between the point of origin of this shipment and the point of destination, the car in which it is being vehicled passes over a line of track wholly within a city, within a county, within a state, the railway company operating that line of track while moving such car is engaged in interstate commerce.

So, applying this rule of law, if it has been shown to you that on the occasion named the Belt Railway Company was engaged in interstate commerce, and while so engaged moved a train of which less than 75 per cent. of the cars were equipped and operated with power or train brakes from the engine, you will find in favor of the United States. If, on the contrary, it has not been so shown, your verdict will be for the defendant.

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## UNITED STATES *v.* PHILADELPHIA & READING RAILWAY COMPANY.

(United States District Court, Eastern District of Pennsylvania.)

March 17, 1908.

[For opinion denying new trial, see 162 Fed. Rep., 403.]

1. An action brought to recover the penalty provided for in the Safety Appliance Act is not a criminal case.
2. The Government need not prove its case beyond a reasonable doubt; it is sufficient if it furnishes clear and satisfactory evidence of all the necessary facts.
3. The statute requires as to couplers that the apparatus on each end of every car shall be in operative condition.

4. In order to constitute a violation of the Safety Appliance Act the car must be moved in a defective condition.
5. Where a car which had been at rest at a station for a period of time is taken out upon the road in a defective condition the carrier is liable for the penalty, and it is wholly immaterial whether the defendant knew of the defect or could have ascertained its condition by the exercise of reasonable care; in such a case the carrier must find the defect at its peril.

J. WHITAKER THOMPSON, *United States attorney*, JOHN C. SWARTLEY, *assistant United States attorney*, and LUTHER M. WALTER, *special assistant United States attorney*, for the United States.

JAMES F. CAMPBELL, for the defendant.

MCPHERSON, *District Judge* (charging jury):

Gentlemen of the jury: It is possible that you may have heard the instructions that I gave to the jury that just went out, but it is my duty to repeat them briefly to you with regard to this case. Practically the same questions are involved, and another question also with which you need not be troubled.

Of course, the defendant, as is conceded, is an interstate common carrier; that is, it is engaged in the business of carrying commerce between States, between one state and another, and, therefore, that business is within the power of Congress to regulate. This particular car, as has been agreed upon, originated at a point in the state, and its journey terminated at another point within the state.

Under certain circumstances there would be no question whatever that it was beyond the power of Congress to regulate it in any way, because, as you know, and I may say briefly, the power of the State over business that is entirely transacted within its borders is exclusive. Congress has no power over it. It is only commerce that goes from one State to another, interstate commerce so-called, that Congress has a right to regulate. But there is a legal question here based upon uncontroverted evidence that will be for the court to



determine later, and for the present, therefore, we shall treat this case as if it were within the power of Congress to regulate, and as if this car was engaged in interstate traffic. So you will understand that you may assume that to be the case. Therefore, if there were nothing else in the case and you should find that this car was out of order and that the Act had been violated, it would be your duty to find in favor of the Government for the penalty which is denounced by the Act of Congress.

The only question of fact, therefore, that will be for you to determine is whether or not this car was out of order and whether these appliances which have been made necessary by the Act of Congress were in operative condition, because if they were not, if this car would not couple automatically by impact, or if it could not be uncoupled unless somebody went between the cars in order to uncouple it, then it would be out of operative order and the Act of Congress would not be violated. Whether or not the company inspected this car, were diligent and careful in inspecting it, is not a matter that you need concern yourselves about. As I regard the statute, the Act requires these defects to be found at the peril of the company, and if they fail to find them, then they are responsible for the penalty, even though they may have honestly done all in their power to do. If there is carelessness and negligence, of course they would be responsible, but even if they put careful men on, and careful men had done their work as well as they knew how; nevertheless, if through some oversight—which even the most careful men are liable to commit—this defect was not discovered, then the company would be responsible.

But the question of fact here is whether or not this defect existed, and that contention is raised here by the defendant. The allegation is, and they have produced evidence bearing upon that question, that this defect did not exist upon this particular car, and you must resolve that question according to the evidence. That is, the inspectors may have been mistaken; they may have found a defect, but not upon this par-

ticular car, and, as the Government put its case upon this particular car being out of order, of course it is bound by that allegation, and, although some other car may have been out of order, unless it was this one, of course, the Government cannot succeed.

There is only this else to be said: This is not a criminal case. While it is a suit for a penalty, it is not a criminal case. The suit here is not brought upon an indictment found by the grand jury. It is brought as civil suits are ordinarily brought, by the filing of a statement of claim on behalf of the Government, and the suit here is to recover a verdict of \$100, and not to punish the defendant by a fine or imprisonment inflicted upon any person. That being so, the Government is not bound to make out its case beyond a reasonable doubt—which is the rule, as you know, which is to be applied in criminal cases—but the evidence must, since this is a penal case, be clear and satisfactory, and the burden of proof is upon the Government throughout the case to make out all the elements which go to establish the charge before it is entitled to recover. And you must apply those rules to the evidence that has been laid before you.

If the Government has not made out its case by clear and satisfactory evidence, then it has failed, and your verdict ought to be in favor of the defendant. If you are satisfied clearly and satisfactorily that this defect existed upon this car, so that it could not couple automatically by impact, or that it could not be uncoupled unless somebody went between the cars, then, as a matter of course, the car was out of order, and the defendant would be liable for the penalty. I should add this: That it is the duty of the companies to keep both ends of these cars in proper order; that the Act is not complied with unless both couplers are in working and operative condition. It is not enough that one should be in order—both must be so that they can be worked. There has been evidence here that under certain conditions, although one of the couplers might not be working, still if the car that is defectively equipped met another car that was in good order,

the process of coupling—of automatically coupling—might take place, but even then the cars could not be uncoupled under certain conditions unless a brakeman or somebody went between the cars in order to uncouple. But the rule is, and I instruct you that that is the meaning of the statute, that both ends of each car must have the coupler in proper operative condition, and if either is out of order the law has been disobeyed.

There is only one charge here, and therefore your verdict would either be in favor of the Government for \$100 or in favor of the defendant.

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UNITED STATES *v.* BALTIMORE & OHIO RAILROAD  
COMPANY.

(United States District Court, Southern District of Ohio, Eastern  
Division.)

June 10, 1909.

(Syllabus by the court.)

1. An action to recover a penalty under the Federal Safety Appliance Law is civil in its nature, not criminal, and the Government, in order to obtain a verdict in its favor, must satisfy the jury by a preponderance of the evidence that the facts set out in its cause of action are true.
2. A carrier, having equipped its cars with couplers and grab-irons required by statute, is not absolutely bound to insure that such appliances are constantly in good order and workable condition.
3. It is just and reasonable that a carrier should exercise a high degree of care to keep couplers and grab-irons in proper condition, but it would be unjust and unreasonable to say that, having fulfilled its utmost duty in that regard, it should be held responsible for a condition which might occur without its fault.
4. The carrier's duty of inspecting its cars is a continuing one, and reasonable care requires that couplers and grab-irons should be inspected at reasonable intervals of time by skillful and competent inspectors. The carrier is bound to prove that it uses all reasonably possible endeavor to perform its duty in regard to discovering and correcting defects in its safety appliances.
5. If a carrier engaged in interstate commerce moves a car having a defective coupler which could have been discovered by reasonable inspection, then it would be liable for violation of the Safety Appli-

ance Acts; but if the carrier uses all reasonably possible endeavor in the performance of its duty of inspection and finds no defects, then it has performed its duty and is not liable.

6. Positive testimony is to be preferred to negative testimony, other things being equal; but what may be negative testimony under one state of facts is not negative under another. If the jury finds it was the duty of a carrier's inspectors to inspect the cars and that they did inspect them, but did not see any defective appliances, that is not such negative testimony as not to receive the same consideration as the positive testimony of the government inspectors.

SHERMAN T. MCPHERSON, *United States attorney*, and  
ULYSSES BUTLER, *special assistant United States attorney*, for  
the United States.

F. A. DURBAN, R. J. KING, and J. M. LESSICK, for the de-  
fendant.

SATER, *District Judge* (charging jury):

Gentlemen of the jury, there is a section of the law which provides that it shall be unlawful for any common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. It was the duty of the defendant as a common carrier to have each end of each car equipped with a coupler of the kind prescribed by statute. The first cause of action charges that, in violation of law, on the 14th day of October, 1907, the defendant company hauled westerly from Holloway, Ohio, over its line of railroad, in one of its trains, car numbered 57677, loaded with interstate traffic, when the coupling and uncoupling apparatus on its "A" end was out of repair and inoperative, in that the chain connecting the lock block or lock pin to the uncoupling lever was missing on that end of the car, in consequence of which it was necessary for trainmen to go between the ends of the cars to couple or uncouple them.

There is another section of the law under which the second cause of action is brought. That section provides that it shall

be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for the greater security of the men in coupling and uncoupling cars. The second cause of action charges that a car regularly used in interstate traffic, numbered X-5110, was, on the same day, hauled westerly from Halloway, Ohio, by the defendant company in a train containing interstate traffic, while there was missing from the right-hand side of its "A" end a grab-iron or handhold, and when such end was not provided with secure grab-irons or handholds, and that such car was in that respect defective. Both of the sections to which your attention has been directed were designed for the protection of the life and limbs of railway employees while engaged in the work of interstate transportation.

The defendant denies that the coupler on the one car was defective or that the grab-iron on the other was missing, and that it hauled either of such cars in violation of law. This is a general denial of the offenses charged in the amended petition.

As a further, and what I shall for convenience call a second, defense, the defendant says the first-named car was duly equipped with couplers of the character required, and the other with a grab-iron; that at all times after such cars had been so equipped it had exercised due and reasonable care to keep itself informed by inspection and otherwise as to the condition of each of such devices to detect any defects or imperfections in them, or either of them, and to keep them and each of them in proper repair and working order; and that within a reasonable time prior to the movement of such cars it had duly inspected the device in question on each and found it in good repair and working order and free from any observable defects, and did not know at the date mentioned or have cause to believe that such devices, or either of them, were out of repair or inoperative.

The action is civil, not criminal. The Government must stand on the case stated in its amended petition. To obtain



a verdict in its favor it must satisfy you by a preponderance of the evidence, which means the greater weight of the evidence, that the facts set out in its respective causes of action are true. A failure to do so is fatal to its right to recover. There being two causes of action, you may, if the evidence justifies it, return a verdict in favor of the Government on one of them, or on both of them, or on neither of them.

The defendant is engaged in interstate commerce, which means commerce between different States of the Union. You must determine from the evidence and the charge of the court whether or not the cars in question, or either of them, were used in interstate commerce.

It is necessary for the Government to prove, to recover on the first cause of action, that the coupler in question was defective at the time stated, as charged, and that the car to which it was attached was loaded with interstate traffic, and was hauled, as alleged, over the defendant's road. To recover on the second cause of action the Government must show that at the time stated the grab-iron mentioned was missing and that the car in question was hauled in and was a part of a train that was used in and contained interstate traffic. It must, to recover on either of the causes of action, prove all the averments therein contained. If it does that, it is entitled to your verdict, unless you find in favor of the defendant on what I have termed its further or second defense to each of its respective causes of action, and to which I shall direct your attention later. The Government has not charged and it is not necessary for it to prove, or for you to find, that the car mentioned in the second cause of action was loaded with interstate traffic, but the Government, to recover, must prove that the car was hauled in and was part of a train which was engaged in transporting merchandise or freight from one State to another.

It is conceded that the defendant company had originally equipped the first-mentioned car with a coupler of the kind required by statute and the other car with a grab-iron or handhold. Having done so, it was not absolutely bound to

insure that the coupler on the one car and the grab-iron on the other were constantly in good order—that the coupler was always in a workable condition or the grab-iron always in a condition for use. The coupling apparatus on railroad cars is subjected at all times while they are in operation to almost constant strain and wrench and liability to breakage. The handholds are also in use more or less and are subjected to strain and liability to breakage caused by such use. Much of the time cars are connected up in trains running on time schedules and are under the orders of train dispatchers, which must be observed or fatal and disastrous consequences may ensue. Then, again, accidents to couplers or grab-irons, or unknown defects in them, may appear at places more or less remote from repair shops. It is just and reasonable that a carrier should exercise a high degree of care to keep its couplers and grab-irons in proper condition, but it would be unjust and unreasonable to say that, having fulfilled its utmost duty in that regard, it should be held responsible for a condition which might occur without its fault. What, then, were the duties of the railroad company in the maintenance of the coupler and grab-iron in workable condition and good repair?

Having properly equipped the cars in question as required by statute, the railroad company was bound to exercise that reasonable degree of diligence—all reasonable possible endeavor—to inspect and keep the coupler and grab-iron, respectively, in workable condition and repair, which would be proportionate to the danger in the use of each, and you are to consider the nature of the defendant's business and the use to which its cars and the couplers and grab-irons thereon are subjected in measuring what would be that reasonable degree of diligence in inspecting. The railroad company's duty of inspection was a continuing one. Reasonable care required that the coupler and grab-iron in question should have been inspected at reasonable intervals of time by skillful and competent inspectors who were selected with ordinary care. By ordinary care I mean that care which a

reasonably prudent man would ordinarily exercise under circumstances and in a situation similar to that in which the defendant company found itself.

If you find from the evidence that the Government has proved that the first of these cars was loaded with interstate traffic, that the other was hauled in a train which was engaged in interstate traffic, that on the car first mentioned there was a defective coupler, as charged, and on the car in the second cause of action mentioned the grab-iron was missing, and that the defendant was hauling these cars upon its tracks at the time mentioned and as alleged in the amended petition, then the railroad company was bound to prove that it had used all reasonable possible endeavor to perform its duty to discover and correct such defects. If it did this, it is entitled to your verdict. If it failed to do so, your verdict should then be for the Government, on one or both of the causes of action, as the case may be.

If the coupler was defective, as alleged, and the grab-iron was missing on October 14, 1907, they each must have become so at some time previous to the date at which the inspectors say they saw such defects in the respective cars, and if the defects existed and the defendant had knowledge of them, or should with reasonable diligence have had notice of them, and with such knowledge, actual or implied, continued without some justifying necessity to haul the car mentioned in the first cause of action, as therein stated, when loaded with goods which were the subject of interstate commerce, or the other car, as charged in the second cause of action, in a train which was hauling interstate traffic, then it violated the statute and your verdict should be for the Government on one or both of the counts, as the evidence may justify.

If you find from the evidence that the railroad company started these cars, or either of them, in transit on their journey, the one with a defective coupler, which could have been discovered by the sort of inspection which I have mentioned, and the other with the missing grab-iron, which could have been discovered by the same kind of inspection, then

the company would be liable and your verdict should be against it on both or either of the counts, as you may find from the facts.

If the coupler on the one car was defective, as alleged, when the car was started in transit on the day mentioned, and the defect was not discoverable by the kind of inspection I have named, or if it was not defective at all, your verdict should, as to the first cause of action, be for the defendant; it should be for the defendant on the second cause of action also, even if the grab-iron was missing from the car therein mentioned, if, by the same sort of inspection, the defect was not discoverable, or if the grab-iron in fact was not missing.

If you should find from the evidence that the automatic coupler was defective and out of repair, as charged, on the one car; but that the grab-iron on the other was missing, as alleged; that on the date named the first car was transporting interstate traffic and the second was hauled in a train used for transporting such traffic, and that the railroad company used all reasonably possible endeavor in the performance of its duty of inspection to determine whether or not there was any defect in the coupler or the grab-iron, and that, if from such inspection it found no defect, then the railroad company performed its duty and is not liable, and your verdict should be for it on one or both causes of action, as the facts warrant.

Portions of the testimony conflict. Was the coupler defective and the grab-iron missing in the manner charged in the amended petition on the 14th day of October, 1907? The Government offered two inspectors as witnesses. They testified that they were at Holloway on that date and within a few minutes prior to the departure of the train called first 83, pulled by engine No. 2270, and that they saw and examined car No. 57677, which was in that train. At that time they each, so they say, entered in a memorandum book what they testify they respectively observed, and they have described to you what they say they saw defective in the coupler. They fixed the time of that train's departure



at 9:50 in the morning, eastern time. These inspectors also say that about 10:40 in the morning they saw the other train, being second 83, drawn by engine No. 2203, in which train was car No. X-5110, and that it moved out of the yards about 11:20 in the morning, eastern time. They told you that they saw that the grab-iron in question was missing from the car and that each made a memorandum as to that. The conductor of the first train, offered as a witness by the defendant, testified that his train moved out of Holloway on the date in question at 6:35 a. m., and produced his record or memorandum, which he said was made at the time, containing an entry of the departure of his train at that hour. The conductor of the second train testified in behalf of the defendant that his train on that date left Holloway at 10:25 central time, and that he at that time made a record or memorandum of his hour of departure, which memorandum he produced as a witness. There may have been other evidence by one or the other or both of the parties as to the departure of those trains. You will remember as to that, as I am not pretending to direct your attention to all the evidence or for any purpose other than that of illustration and of bringing to your notice some of the matters which you should consider. Who is in error as to the time of the departure of those trains? If the first train departed at 6:35 in the morning, these inspectors could not have seen the engine, or the car, or the train at all. There is no evidence to show that they were in the location of the train or the car until a few minutes prior to 9:50 a. m. They gave, however, correctly the number of each of the cars mentioned in the amended petition and of each of the engines which pulled them. The evidence shows that both engines arrived at Lorain on the same day, and that engine number 2270 had in its train at Lorain the car in the first cause of action mentioned, and on the same day, and that engine No. 2270 had in its train that engine numbered 2203 handled the other car. One of the questions to be answered by you is, How could the inspectors have gotten the numbers of the engines and the numbers of



the cars unless they saw them at Holloway? Are they and their memoranda, or are the railroad employees and their memoranda, in error? You must take all of the evidence touching the departure and movement of these trains and determine where the truth lies.

In reaching a conclusion as to whether the coupler was defective, or the grab-iron missing, you will consider the degree of care with which the Government inspectors and railway employees, respectively, made their respective inspections, and the probability or improbability of mistake therein. Who made the more careful inspection? You have heard the evidence of the two Government inspectors whose duty it is to examine cars with reference to their safety appliances. The defendant offered as witnesses: conductors, trainmen, and also inspectors whose duty it is to inspect cars, and these employees all detailed what they did in the way of inspection. The Government inspectors say they observed a defective coupler and a missing grab-iron. The other witnesses say they did not observe such. One of the defendant's witnesses said that he spent about a minute and a half on a car in his inspection. It is for you to say how thoroughly, in that time, he could inspect it, and whether or not he would learn as much about a car as the other men whose business it is to inspect. How much time other railroad employees spent on each car does not appear in the record, as I recall it, but, as to that, use your own memories. Another one said he inspected the bolsters underneath, the couplers, the hand-holds, the whole car. You must decide for yourselves whose testimony you will accept as regards the condition of the two cars, giving to each witness such credibility and weight as you think he should have.

Something has been said in your hearing about the inspectors not having directed the attention of the railroad employees to what they say was the defective condition of the coupler and grab-iron, respectively. They were not required to direct the railroad employees' attention to any defects. It was no part of their duty to do so.

Evidence was given that on or about October 12, 1907, car No. X-5110 was repaired, a new truck bolster being applied, and that both cars in question were inspected at Lorain, one on the 20th, as I remember, and the other on the 26th of the month, and that neither of the cars were shopped, as it is called, between those respective dates and the 14th. The value of that testimony is to be determined by you. The real question is, What was the condition of the cars on the 14th? Was there on that date, as is charged, a defective coupler on the one and a missing grab-iron on the other? You must answer that from all the evidence that was given touching upon that issue.

Some, perhaps all, of those who testified in behalf of the defendant, and some of those who testified for the Government, are railroad employees. Two of the witnesses offered by the Government, who were called detectives in the course of the argument, are inspectors in the employ of the Interstate Commerce Commission. It is necessary that the railroad company should employ men to do its business. It is also necessary that the Government should employ men to look after its business and to see that the law is observed. These men who testified before you, whether they are railroad employees or inspectors, are not to be disbelieved simply because they work for the defendant or are in the Government's service, as the case may be. You are the judges of the weight of the evidence and the credibility of witnesses. Taking each of these witnesses as you saw him, and his evidence as you heard it, consider his intelligence, his means and opportunities of knowledge concerning that about which he testified, whether or not he is corroborated or uncorroborated, the probability or improbability of his statements, his conduct on the witness stand, and all other facts disclosed by the evidence, and then determine the degree of credibility to be given to him.

What the government inspectors state they saw regarding the coupler and the grab-iron was characterized in argument

as positive testimony. Other witnesses, in the employ of the defendant, testified that they did not see any such defects, and this has been characterized by the Government's counsel as being negative testimony, while defendant's counsel insist that it is positive. Positive testimony is to be preferred to negative testimony, other things being equal. That is to say, when a credible witness testifies to having observed a fact at a particular time and place, and another equally credible witness testifies to having failed to observe the same fact, having the same or equal opportunity so to observe such fact, the positive declaration is to be preferred to the negative in the absence of other testimony corroborating the one or the other. But what may be negative testimony under one state of facts is not negative under another. For instance, a man might testify that he did not hear a whistle blown or bell rung. He is testifying to a negative circumstance and his testimony perhaps is not entitled to as much weight as the testimony of a man who says he did hear; but if it was his duty to hear the whistle or the bell, then if the witness says he did not hear it, while his testimony is negative in character, yet because it was his duty to hear, other things between the witnesses being equal, his testimony should be given the same weight as the testimony of the man who said he heard the bell or whistle.

Now, it is the same with the testimony in this case. If you find it was the duty of the inspectors on the part of the railroad company to inspect the cars and that they did inspect them and did not see the defective coupler or the missing grab-iron, that is not such negative testimony as not to receive the same consideration, other things being equal between the witnesses, as positive testimony. It would then, as would that of the Government inspectors, be positive testimony.

When you retire to the jury room you may select one of your own number as foreman. You will understand that you are to act impartially as between the parties. The fact that one party is the Government and the other a railroad company should not cause you to discriminate in the slightest

against either. They stand on an absolute equality. The law is no respecter of persons. Deal conscientiously with the parties. You may retire.

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UNITED STATES v. WABASH-PITTSBURGH TERMINAL RAILWAY COMPANY.

(United States District Court, Western District of Pennsylvania.)  
November 3, 1909.

1. The maintenance of one grab-iron or handhold on each side of the car near the "B" end is not a compliance with the Federal Safety Appliance Act, as the necessity of having such grab-iron or handhold upon each side of the car near each end of the car is fairly contemplated by the very language of the Act.

JOHN H. JORDAN, *United States Attorney*, and MONROE C. LIST, *special assistant United States Attorney*, for the United States.

JAMES R. MILLER and H. F. BAKER, for the defendant.  
ORR, *District Judge* (charging jury):

This is an action of *assumpsit* brought by the United States against the Wabash-Pittsburgh Terminal Railway Company to recover from the railway company for the violations of an Act of Congress which is entitled, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes." The fourth section of the Act says, "that from and after the 1st day of July, 1895, unless otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not equipped with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling the cars."

Most of the causes of action in this complaint relate to the section that I have just read. Some relate, however, to an-



other section of the Act, being Section 2, wherein it is provided that "on and after the 1st of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." And the Act provides that "any common carrier using or carrying or permitting to be hauled or carried on its line any car in violation of the provisions of this Act shall be liable to a penalty of \$100 for each and every such violation," to be recovered in a suit such as is now before the court.

It is admitted that the defendant is a common carrier engaged in interstate traffic; that the cars upon which the alleged defects appeared were engaged in the transportation of interstate commerce, and it is not denied that the cars, to which your attention has been called by initials and numbers, were defective in the matter of couplers; and it is not denied by evidence other than a plan that has been introduced by consent, that the cars did not have grab-irons and handholds as required by the Act of Congress; but the defendant insists that the cars without the grab-irons and handholds on the sides, as testified by the witnesses, were not constructed and maintained in violation of the terms of this Act of Congress. Defendant insists that, because it has one grab-iron or handhold on each side of each car near the "B" end, where the coupling is to take place, the law has been complied with and that it is not necessary to have a grab-iron or handhold upon the side of each car near the other end of the car, the "A" end, as it has been explained to you.

Now, I hold, and so instruct you, that the maintenance of one grab-iron or handhold on each side of the car near the "B" end thereon is not a compliance with the Act of Congress. I think the necessity of having such grab-irons or handholds upon the sides of the car near either end of the car is fairly contemplated by the very language of the Act, because it contemplates in this language, "secure grab-irons



or handholds in the sides of each car." It contemplates, it seems to me, although it is not exactly plain, that the side of each car ought to have more than one grab-iron or handhold. contemplated by the very language of the Act, because it contemplates in this language, "secure grabirons or handholds in the sides of each car." It contemplates, it seems to me, although it is not exactly plain, that the side of each car ought to have more than one grab-iron or handhold.

I instruct you, under the evidence, to find a verdict for the plaintiff, the United States, for \$1,200 for the causes of action.

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UNITED STATES *v.* PENNSYLVANIA RAILROAD  
COMPANY.

(United States District Court, Western District of Pennsylvania.)

November 3, 1909.

1. It is imperative that the couplings on both ends of every car used in interstate commerce should be capable of being operated in the manner intended by the Federal Safety Appliance Act, so as to make it unnecessary for an employee to go between the ends of the cars.
2. It appears that the car involved in this case was in control of a crew of the Panhandle Railway Company, but it was hauled, and permitted to be hauled, over the tracks of the line of the defendant in a defective condition toward its destination: *Held*, That the defendant is liable for the statutory penalty.
3. Reasonable care, or the utmost care, on the part of the railroad company, will not excuse it from liability under the Safety Appliance Act. It is not necessary to prove willful negligence, or any negligence at all, on the part of such carrier in order to make it liable for the penalty.

JOHN H. JORDAN, *United States attorney*, and MONROE C. LIST, *special assistant United States attorney*, for the United States.

PATTERSON, STERRETT & ACHESON, for the defendant.

ORE, *District Judge* (charging jury):

The case that has been tried before you is a case by the United States against the Pennsylvania Railroad Company to recover a penalty provided by the Safety Appliance Act, as

amended and passed by Congress. Whether or not that Act meets with your approval or mine is not the question. It is a question of whether or not there has been a violation of that Act, and whether or not under the evidence in this case the defendant has been guilty of that violation.

The Act was passed with a view, I presume, of doing something to prevent injuries to trainmen. It has been the experience of us all—more in times past, perhaps, than in the present—that when we would shake hands with a railroad employee, oftentimes, especially in and about the yards, we would find that the hand was not all there, and we cannot help but appreciate that with the loss of a portion of such a valuable member as the hand, a source of wealth to the United States was diminished; and therefore Congress undertook, as I say, to pass an Act requiring railroads to conform to certain provisions, and imposing penalties if they did not so conform, and authorizing a suit to be brought, such as this, to recover those penalties where the Act had been violated.

That Act provides that “it shall be unlawful for any common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,” and it provides that for each offense such railroad may be liable to pay the sum of \$100.

I say to you that Congress had power to pass this Act, so far as it related to interstate commerce, and that is all it pretends to relate to. By that Act there is imposed an imperative duty upon each railroad company engaged in interstate commerce; that is, commerce between the states and not intrastate commerce, within the state, to comply with the provisions, and if a car is not equipped with couplers—the plural is used—coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, then the railroad company is liable. And I say to you that it is not material to this case that the car to which the defective couplings may be attached is not de-

fective, and that the two cars may be separated by the use of the coupling on the one car that is not defective; but it is imperative that the couplings on both ends of each car should be capable of being used in the manner intended by the Act, so as to prevent a person from going between the cars.

It is charged in this case that the Pennsylvania Railroad Company, on or about the 17th of November, 1906, permitted a train to leave its yards at Pitcairn, in which there was a car used in interstate commerce, that car, I believe, being bound to St. Louis, or in that neighborhood. It is true it appears that the car was in control of a crew of what is known as the Panhandle Railroad Company; that is, the Pittsburgh, Cincinnati, Chicago & St. Louis; that that was the point of delivery by the Pennsylvania Railroad—to the Panhandle Railroad—of this freight and of this car. But it also appears that car left the Pitcairn yards and was hauled and permitted to be hauled over the tracks of the line of the Pennsylvania Railroad Company on toward its destination.

Now, it is not disputed that this car was defective in that the coupler on the "B" end had a broken clevis and clevis pin. That being the case, the Pennsylvania Railroad Company is liable to a penalty.

I say to you, as a matter of law, that reasonable care or the utmost care on the part of the railroad company will not excuse the company from liability under this Act. It seems a hard rule, but it is a rule that is laid down in this Act, and that rule must be enforced in order to accomplish the purposes intended by Congress when the Act was passed, and I say to you that willful negligence is not necessary to be shown on the part of the railroad company, or any negligence at all on the part of the railroad company, except to show that a car used in interstate commerce was not equipped in accordance with the provisions of this Act of Congress.

There is no dispute of fact in this case that I can see, and I therefore direct you to find a verdict for the plaintiff in the sum of \$100, being the amount of the penalty prescribed by the Act.

UNITED STATES *v.* ATCHISON, TOPEKA & SANTA  
FE RAILWAY COMPANY.

(United States District Court, Northern District of Illinois.)

December 27, 1909.

1. The statute provides that interstate cars shall have secure grab-irons or handholds on the ends and sides of each car. The only question arising in this case was whether the coupling lever constituted a secure grab-iron or handhold on the end of the car, as the statute has not definitely and distinctly defined what is a secure grab-iron or handhold. It is for the jury to answer that question and determine whether or not the coupling lever that was provided was a secure grab-iron or secure handhold within the meaning of the statute.
2. The mere fact that the coupling lever was used for the coupling and uncoupling of cars was no reason why it could not be used as a grab-iron, always assuming that it was so placed and was of such material and such size that it did constitute a secure grab-iron or handhold.
3. A suit for penalty under the Federal Safety Appliance Acts is civil in its nature, and the verdict should be brought in upon the preponderance of the evidence. The phrase "preponderance of the evidence" discussed and defined.
4. The jury should not cast out the testimony of witnesses for the United States because they are inspectors in the employ of the Interstate Commerce Commission; nor should they cast out the testimony of the defendant's witnesses because they are in the employ of a railway company; but all those things are to be taken into consideration by the jury in determining the probable weight which should be given to the testimony.

EDWIN W. SIMS, *United States attorney*, and HARRY A. PARKIN, *assistant United States attorney*, for the United States.

ROBERT DUNLAP, LEE F. ENGLISH, and JAMES L. COLEMAN, for the defendant.

LANDIS, *District Judge* (charging jury):

In this suit the United States seeks the recovery of \$100 as a penalty claimed by the Government to have been incurred by the Atchison, Topeka & Santa Fe Railway Company, defendant, by reason of the failure of the defendant company to comply with a certain statute of the United States. That statute provides that it shall be unlawful for any railroad



company to use any car in interstate commerce that is not provided with secure grab-irons or handholds on the ends and sides of each car for greater security to men in coupling and uncoupling cars. In this case you have nothing to do with any controversy as to whether or not the car in question was being used in interstate commerce. It was. The only question here is whether the coupling lever which the witnesses have testified about was so placed, was of such size and strength, as that in its condition and the position in which it was at the time in question it constituted a secure grab-iron or handhold on the end of that car. What is a secure grab-iron or handhold the statute has not definitely and distinctly defined. It is for you to answer that question and determine whether or not this coupling lever that was provided was a secure grab-iron or secure handhold within the meaning of this statute. If it was, then your finding should be in favor of the defendant, for the mere fact that the coupling lever was used for the coupling and uncoupling of cars was no reason why it could not be used as a grab-iron, always assuming that it was so placed and was of such material and such size that it did constitute a secure grabiron or handhold. If you find that it was not, then you will find against the defendant.

Now, in this case, which is a civil case, the rule is that if the evidence shows by a preponderance that this coupling lever was not a secure grab-iron or handhold, as those terms are used in this statute, then the defendant is guilty. If there is no preponderance of the evidence, that is to say, if the evidence is evenly balanced and you cannot say on which side is the preponderance, then your verdict must be in favor of the defendant, and "not guilty." If the preponderance of the evidence is for the defendant, then your verdict must be "not guilty." In this respect this case differs from a case which all of you, or some of you, on a recent occasion, heard in the criminal branch of this court. You will recall that in that case the rule which the court defined to you as applicable was the rule that required the evidence to convince the jury beyond all reasonable doubt of the defendant's guilt before



a verdict could be returned against the defendant. Not so here.

Now, what is meant by a preponderance of the evidence? The best I can say to you as to what the phrase "preponderance of the evidence" means is looking over the whole case, all the evidence in the case, considering the testimony of each and all the witnesses, including the stipulation which has been read in evidence as being the statement of what a witness who was not present here would have testified to had he been called; looking over all the evidence in the case, sifting out that which is untrue or inaccurate or false, laying hold of that and identifying that which is true and accurate and commends itself to you as being the truth of the situation—on which side is the greater weight of such evidence—in support of the proposition that this thing was not a secure grab-iron or handhold, or in support of the proposition that it was; or, as I have said before, if there is no weight, then your verdict must be "not guilty."

Now, in determining where this greater weight of the evidence is, it will become necessary for you to ascertain who has told the truth. With a view to ascertaining that fact, that is to say, with a view to ascertaining what credit you will give to the testimony of the several witnesses, you will take into consideration their interest in the outcome of this lawsuit, or their interest in the subject matter of this lawsuit, in so far as the evidence discloses any interest on their part, the opportunity which the witness or witnesses have to know about the things respecting which they have testified, the disposition of the witness or witnesses to speak candidly and freely and frankly and openly in reply to the interrogatories respecting the subject matter under inquiry, the probability, the inherent probability or improbability, of the truthfulness of the witnesses' statements—all these things, and such other considerations as your experience and judgment as men experienced in the affairs of life suggest to your minds, with a view to determining who told the truth and who did not tell the truth. And when you have done this and have determined where the

truth is, then it is quite likely that you will have determined where "preponderance" is. Preponderance is not a thing that is controlled necessarily by the number of witnesses. The preponderance or greater weight of the evidence is on that side of the controversy where the truth is, and it may be with the fewer witnesses as against the greater number of the witnesses. If anybody has been impeached on the trial of this case, that is to say, if it has appeared that somebody has made a statement on the trial of this case contrary to the statements made on another trial or elsewhere on a prior occasion respecting a material matter in this inquiry, the law is, you may disregard his entire testimony except in so far as it may be corroborated by other facts, or by facts and circumstances proved on this trial. You have no right to disregard the testimony of any witness merely because he is employed by somebody. You can not cast out the testimony of these two witnesses for the United States because they are inspectors in the employ of the Interstate Commerce Commission; you cannot cast out the testimony of the defendant's witnesses because they are in the employ of the defendant, or in the employ of other railway companies, though all of those things are to be taken into consideration by the jury in determining the probable weight which you will give to their testimony.

Now, in this case the plaintiff is the United States, and the defendant is a railway company. On the question of financial condition, I suppose it may truthfully be said they are both in easy circumstances. So the question of the matter referred to here as to one side being rich makes no difference. It may be that it is proper for me to utter a word of admonition against the proposition of your being possibly inclined against the defendant because it is a railway corporation. Your services here, the manner in which you have discharged your duties, is evidence to me to the fullest extent that the fact that somebody is being sued that is a corporation is not a fact that imperils that corporation's rights with you. So, if you consider this case as you have other cases, and decide the question on its merits, regardless of who is plain-

tiff or defendant, and regardless of whether one or both or any are in good financial condition, having in mind no other purpose in the world than to arrive at the truth of the controversy, you will have discharged your duty well.

D. S. SNYDER *v.* SOUTHERN RAILWAY COMPANY.

(In the Circuit Court of the United States for the Eastern District of Tennessee.)

[Affirmed, 187 Fed. 492.]

*Decided January 21, 1910.*

1. The provisions of the Federal Safety Appliance Act as to couplers was intended to apply not merely to those cars which are being used in the movement of interstate traffic at a given moment, but to all cars hauled or used on its line that are customarily and generally employed in moving interstate traffic, or in connection with vehicles used in moving interstate traffic.
2. A car regularly used in moving interstate traffic, or in connection therewith, is subject to the provisions of the Safety Appliance Act in reference to automatic couplers when used, although at the particular time it is being hauled empty or not in connection with the movement of interstate traffic.
3. The Safety Appliance Act is a remedial statute, and must be so construed as to accomplish the intent of Congress. Its provisions should not be taken in a narrow sense, nor should its undoubted humanitarian purpose be frittered away by judicial construction.
4. A construction exempting from the operation of the act cars which, although regularly used in interstate commerce, were not being so used at the particular time, would put upon the employee working with such car the practically impossible burden of ascertaining whether or not a given car was in fact being used in connection with the hauling of interstate traffic at the particular time—that is, of ascertaining the character of its load and that of the other cars in the train—in determining whether or not, in working with it, he would or would not assume the risk arising from its being in a condition which did not comply with the Safety Appliance Act.
5. A car regularly used by an interstate carrier on its interstate line, which is not segregated and set apart solely for local traffic, but is regularly and habitually used in the movement of interstate traffic or in connection therewith, is, when used on the carrier's line, subject to the provisions of the Safety Appliance Act in reference to the couplers upon it.
6. The Safety Appliance Act is constitutional.

7. A car arrived at the Coster yards of the defendant in a defective condition several days before the accident; it had not been repaired at the Coster shop, where it could have been repaired, but had been hauled away from this repair point en route to the repair shops at Lenoir City, several miles away, for the purpose of being there repaired. *Held:* (a) When the car was put in use, even to be hauled to another repair shop, after it had been for some time at a repair shop where it could have been repaired, it was being hauled in this defective condition in violation of the Safety Appliance Act. (b) Having undertaken to haul the car away from a repair point, it remained within the provisions of the act, even although the effort was afterwards made to detach the car and return it to the Coster yard. (c) Having once moved it away from the Coster yard, where it should have been repaired, it was thereafter moved at the risk of the carrier, so far as the provisions of the Safety Appliance Act were concerned.
8. Under proof as to the temporary purpose for which the plaintiff went between the cars, the customary method of doing such work, the character of lookout established with the crew available, the time of day, the necessity of moving out the cars as directed, and all the circumstances of the case, the verdict of the jury, involving in effect a finding both that the defective coupling was a proximate cause of the injury and that the plaintiff was not guilty of contributory negligence was not against the clear and decided weight of the evidence.
9. A court is always more reluctant to set aside a verdict when it is against the party having the burden of proof, as the defendant had in this case, upon the material question of the contributory negligence of the plaintiff.
10. In view of the serious character of the injuries, involving great suffering and loss of time and the permanent disability of the plaintiff, disabling him from earning a livelihood in the occupation in which he had been engaged, or in other similar labor, the amount of the verdict, \$7,500, does not show that the jury was influenced by prejudice or passion, and that it should not on that ground be set aside as excessive.
11. Plaintiff not being guilty of contributory negligence that barred recovery, he was entitled to full compensatory damages, as this suit was not prosecuted under any statute requiring damages to be assessed on the basis of comparative negligence.
12. Recitals in defendant's records, made by its agents at the time, in the line of their duty, were competent evidence against the company.
13. Evidence as to the customary disposition of defendant's cars was clearly admissible.

PICKLE, TURNER & KENNERLY, for plaintiff.

JOURLIMON, WELCKER & SMITH, for defendant.



## MEMORANDUM OPINION OF THE COURT.

SANFORD, *Judge*, on motion for new trial:

I am of opinion that the motion for a new trial should be overruled, for the following reasons:

1. The rules of law applicable to the facts of this case under the Safety Appliance Law were, I think, correctly stated in the charge to the jury.

By Section 2 of the Safety Appliance Act of March 2, 1893, it was made unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact. By Section 1 of the amendatory Act of March 2, 1903, it was provided that the provisions and requirements of the Act of 1893, relating to automatic couplers, "shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce \* \* \* and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

In *Johnson v. Southern Pac. Co.*, 196 U. S., 1, 21, it was said that this amendatory Act "is affirmative and declaratory, and, in effect, only construed and applied the former act;" and in *Schlemmer v. Buffalo Ry.*, 205 U. S., 1, 10, it was again said that the amendatory Act in the opinion of the Supreme Court "indicates the intent of the original act."

It was further held in the *Johnson* case that a dining car regularly engaged in making interstate journeys was equally under the control of Congress under the safety-appliance law when waiting for the train to be made up for another trip. The Chief Justice, in delivering the opinion of the court, said: "It was being regularly used in the movement of interstate commerce and so within the law" (p. 22). In the light of this decision, and in view of the broad language used in the amendatory Act, I think it clear that the provision as to couplers on cars used on the line of an interstate carrier was intended to apply not merely to those cars which are



being used in the movement of interstate traffic at a given moment, but to all cars hauled or used on its line that are customarily and generally employed in moving interstate traffic, or in connection with vehicles used in moving interstate traffic, and that a car regularly used in moving interstate traffic or in connection therewith, is subject to the provisions of the Safety Appliance Act in reference to automatic couplers when used, although at the particular time it is being hauled empty or not in connection with the movement of interstate traffic. This view is, I think, supported by the case of *Voelker v. Chicago Ry. Co.* (D. C.), 116 Fed., 867, 873, the language used in this opinion being approved obiter in *United States v. Southern Pac. Co.* (D. C.), 145 Fed., 438; *United States v. St. Louis R. Co.* (D. C.), 154 Fed., 516; *United States v. Chicago Ry. Co.* (D. C.), 157 Fed., 616; and *Chicago Ry. Co. v. United States* (C. C. A., 8th Cir.), 168 Fed., 236; and *Thornton's Employers' Liability and Safety Appliance Acts*, Section 127, page 162, and cases cited.

The Safety Appliance Act is a remedial statute, and must be so construed as to accomplish the intent of Congress. *Johnson v. Southern Pac. Co.*, 196 U. S., 1; *United States v. Central Ry. Co.* (D. C.), 167 Fed., 893. Its provisions "should not be taken in a narrow sense." *Schlemmer v. Buffalo Ry. Co.*, 205 U. S., 1, 10. Nor should its undoubted humanitarian purpose be frittered away by judicial construction. *United States v. Chicago Ry. Co.* (D. C.), 149 Fed., 486.

The construction of the Safety Appliance Act which makes it apply, so far as the provisions for automatic couplers are concerned, to all cars used by an interstate carrier on its line in the movement of interstate commerce or in connection therewith, either specially or regularly, is in accordance with the plain intent of Congress, as indicated by the act, to protect the lives and limbs of the employees of interstate carriers. A different construction, exempting from the operation of the act cars which, although regularly used in interstate commerce, were not being so used at the particular time,

would put upon the employee working with such car the practically impossible burden of ascertaining whether or not a given car was in fact being used in connection with the hauling of interstate traffic at the particular time—that is, of ascertaining the character of its load and that of the other cars in the train—in order to determine whether or not in working with it he would or would not assume the risk arising from its being in a condition which did not comply with the Safety Appliance Act.

I therefore conclude that under the terms of the Safety Appliance Act and its amendment, and in the light of the decision above cited, a car regularly used by an interstate carrier on its interstate line, which is not segregated and set apart solely for local traffic, but is regularly and habitually used in the movement of interstate traffic or in connection therewith, is, when used on the carrier's line, subject to the provisions of the Safety Appliance Act in reference to the couplers upon it.

So construed, and as applying to cars which are the regular and habitual instruments used in interstate commerce, there can, I think, be no serious question as to the constitutionality of the Act, especially in the light of the opinion in the Johnson case, in which the Safety Appliance Act was applied to a dining car not actually being used at the time in interstate traffic, but regularly used for that purpose. In this connection, however, it may be noted that in certain cases it has been held broadly, that the Safety Appliance Act, as amended by the Act of 1903, applies to all cars used by an interstate carrier on its interstate highway—a construction broad enough to include even a train of cars segregated and set apart for local traffic only—and that so construed the act is constitutional. *United States v. Chicago Ry. Co.* (D. C.), 149 Fed., 486; *United States v. Southern Ry.* (D. C.), 164 Fed., 347; and opinion of Grosseup, circuit judge, in *Wabash R. Co., v. United States* (C. C. A.), 168 Fed., 1, 8. This, however, involves a more difficult question, both as to the construction of the act and its constitutionality, which is not

necessarily involved in the present case, and as to which no opinion is expressed.

2. Under the facts of this case there was no doubt, as I view it, but that the car whose coupler was defective was in regular use by the defendant in its trains for hauling interstate traffic, and not set apart for purposes of local traffic. Therefore, in my opinion, it was clearly subject to the provisions of the Safety Appliance Act, and as the coupler was admittedly defective it was being used in violation of the law, unless its use at the time came, as is claimed by the defendant, within an exception to the Safety Appliance Act in reference to the movement of a car for repairs. However, under the proof in this case it appeared that the car in question had arrived at the Coster yards of the defendant in a defective condition several days before the accident; that it had not been repaired at the Coster shops where it could have been repaired, but had been hauled away from this repair point en route to the repair shops at Lenoir City, several miles away, for the purpose of being there repaired.

I think it clear, under the authorities, that when the car was put in use even to be hauled to another repair shop after it had been for some time at a repair shop where it could have been repaired it was being hauled in this defective condition in violation of the Safety Appliance Act. *United States v. Chicago Ry. Co.* (D. C.), 149 Fed., 468; *United States v. St. Louis R. Co.* (D. C.), 154 Fed., 516; *United States v. Lehigh Valley R. Co.* (D. C.), 162 Fed., 410, 412; *United States v. Philadelphia R. R.* (D. C.), 162 Fed., 405, 409; *Chicago Ry. v. United States* (C. C. A., 8th Cir.), 165 Fed., 423; *United States v. Atchison Ry.* (D. C.), 167 Fed., 696; *United States v. Southern Pac. Co.* (D. C.), 167 Fed., 699; *United States v. Southern Pac. Co.* (D. C., No. 24, 1909).

Having undertaken to haul the car away from a repair point, it obviously remained, I think, within the provisions of the act, even although the effort was afterwards made to detach the car and return it to the Knoxville yard for repairs. Having once moved it away from the Coster yard, when it

should have been repaired, it was thereafter moved, within the principle of the foregoing cases, at the risk of the carriers so far as the provisions of the Safety Appliance Act were concerned. Nor does the case come within the exception recognized in the opinion of the circuit court of appeals for this circuit in *United States v. Ill. Cent. Ry.*, 170 Fed., 542, as the proof entirely fails to show, either that the defect was one which occurred during transit, or that the utmost diligence was used on discovering and correcting the defect; the proof on the contrary showing great and negligent delay in repairing the coupler after the defect has been discovered.

3. It results that in my opinion there was no error in the charge in respect to the construction and effect of the safety appliance laws or in the refusal to charge the jury as requested in the special requests submitted by the defendant.

4. I am further of the opinion that under the doctrine of *Voelker v. Chicago Ry. Co.* (C. C.), 116 Fed., 867, 875; *Chicago Ry. Co. v. Voelker* (C. C. A., 8th Cir.), 129 Fed., 523, 550; *Chicago Ry. Co. v. King* (C. C. A., 7th Cir.), 169 Fed., 372; and the definition of proximate cause given in *Milwaukee Ry. Co. v. Kellog*, 94 U. S., 469, 475; *Washington R. R. v. Huckey*, 166 U. S., 521, 527; *Atchison Ry. Co. v. Calhoun*, 213 U. S., 1, 7; and *Stone v. Railroad*, 171 Mass., 536, there was evidence to go to the jury as to whether the defective condition of the coupler was a proximate cause of the injury to Snyder; and that under the doctrine of *Narramore v. Ry. Co.* (C. C. A., 6th Cir.), 96 Fed., 298, 304, and of *Chicago Ry. Co. v. King*, *supra*, the question was properly left to the jury to determine whether, under all the circumstances of the case, the plaintiff was guilty of contributory negligence which barred his recovery; and that therefore the defendant's motion for peremptory instructions was properly overruled. See also *Toledo R. Co. v. Bartley* (C. C. A., 6th Cir.), 172 Fed., 82.

5. Furthermore, under the proof as to the temporary purpose for which the plaintiff went between the cars, the customary method of doing such work, the character of lookout



established with the crew available, the time of day, the necessity of moving out the cars as directed, and all the circumstances of the case, I do not think that the verdict of the jury, involving in effect a finding both that the defective coupling was a proximate cause of the injury and that the plaintiff was not guilty of contributory negligence was against the clear and decided weight of the evidence, and hence I am of opinion that it should not be set aside. *Mt. Adams Ry. Co. v. Lowery* (C. C. A., 6th Cir.), 74 Fed., 463, 472; *Felton v. Spire*, 75 Fed., 576 (C. C. A., 6th Cir.). Especially is this true as the court is always more reluctant to set aside a verdict when it is against the party having the burden of proof (*Cunningham v. Magoon*, 18 Pick. Mass., 13) as the defendant had in this case upon the material question of the contributory negligence of the plaintiff.

6. I am likewise of the opinion that in view of the serious character of the injuries, involving great suffering and loss of time and the permanent disability of the plaintiff, disabling him from earning a livelihood in the occupation in which he had been engaged, or in other similar labor, the amount of the verdict does not show that the jury was influenced by prejudice or passion, and that it should not on that ground be set aside as excessive. Clearly if the plaintiff was not guilty of contributory negligence that barred recovery, he was entitled to full compensatory damages, as this suit was not prosecuted under any statute requiring damages to be assessed on the basis of comparative negligence.

7. The recitals in the company's records, made by its agents at the time, in the line of their duty, were, I think, competent evidence against the company under the authority of *Vicksburg R. R. Co. v. Putnam*, 118 U. S., 545, 554; *Chateaugay v. Blake*, 144 U. S., 476, 483; *Missouri Ry. Co. v. Elliott* (C. C. A., 8th Cir.), 102 Fed., 96; *Bank v. Bank*, 108 Tenn., 374, 380; 6 *Thompson on Corporations*, section 7728; 1 *Am. & Eng. Enc. Law*, 2d ed., 718, note as to "Entries in the Books of a Party," and 16 *Cyc.*, 946 as to "memoranda."



The evidence as to the customary disposition of defendant's cars was also, I think, clearly admissible.

An order will accordingly be entered overruling the motion for a new trial.

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ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

BLANCHE RUSSELL, ADMINISTRATRIX, DEFENDANT IN ERROR.

(United States Circuit Court of Appeals, Second Circuit.)

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Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the plaintiff in an action to recover damages for injuries resulting in the death of the plaintiff's intestate, Harry Russell, while employed by the defendant railroad company.

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*Decided December 2, 1910.*

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1. It appears that the defective car in this case was not being hauled at the time of the accident, but was standing upon the switch track for the insertion of the knuckle in the coupling apparatus; *Held*, That the contention of the carrier that such car was not being *used* within the contemplation of the Federal Safety Appliance Acts is not sustained.
2. Though the car itself does not appear to have been used in any interstate business at the time of the accident, which occurred during switching operations and not during either the regular western or eastern movement of the freight trains, yet the test of the application of the Federal Safety Appliance Acts is the *train* rather than the car, and the evidence warrants the finding in this case that the trains in which this car moved into and out of Port Jervis, N. Y., included other cars loaded with interstate shipments. Upon these facts; *Held*, That the Federal Safety Appliance Acts apply.
3. The switchman injured in this case went upon the track to adjust a defective coupler in a car when, without any apparent cause, three other cars which were standing on the same switch, which switch had a slight grade, moved silently down upon him, inflicting the injuries complained of; *Held*, That the defective coupler was a proximate cause of the accident.

4. To hold that the injured switchman was, as a matter of law, guilty of contributory negligence, requires the assumption that the cars which moved down and against the switchman moved because he had failed in his duty to break or block them. But this assumption cannot be made. The cars may have been properly blocked and the blocks loosened by the impact with the car in question shortly before the accident. The question of contributory negligence was one for the jury.
5. The remaining questions raised by the carrier disclose no prejudicial error, and the judgment of the circuit court in favor of the plaintiff is affirmed:

STETSON, JENNINGS & RUSSELL, for plaintiff in error.

JOHN W. LYON and GEORGE A. CLEMENT, for defendant in error.

Before LACOMBE, WARD and NOYES, *Circuit Judges*.

STATEMENT OF FACTS.

There was evidence in the case sufficient to warrant the jury in finding the following facts which are especially relevant to the questions considered in the opinion.

The defendant railroad company is engaged in interstate commerce and owns a railroad extending from Port Jervis, N. Y., to Newburgh, N. Y., and also running into other states. Port Jervis is two or three miles east of the state line between New York and Pennsylvania.

The defendant operates a local freight train between Newburgh and Port Jervis which, when running westerly, carries freight to stations on the road and picks up freight going to all points west, including points in other states. On the easterly trip western freight is carried to local points and local freight is picked up for eastern points. On the afternoon of June 21, 1907, the car in question in this case was brought into Port Jervis in this train billed to the repair shop there. It had a defective coupler; the knuckle being gone. It was empty and had been picked up at Greycourt, a station between Port Jervis and Newburgh. This train on said day carried freight going west of Port Jervis and to different states and one of the cars bore the initials of the Boston and Maine

Railroad. There was another car in the train which was also in a crippled condition. The train, including the crippled cars, was left standing on a switch in the Port Jervis freight yard.

Russell, the plaintiff's intestate, was one of the night-switching crew in the yard. On this afternoon this crew had begun work drilling out and switching the cars from the different trains which had come into the yard from the east and west. Before supper three cars had been placed on the No. 6 switch in the yard and left standing there. This switch had a slight grade. After supper the switching crew continued work and after some time ran the car in question attached to other cars upon said No. 6 switch. The intention of the switching crew was to repair the defective coupler and after repairing it to couple the train containing this car to the three cars aforesaid which had previously been left upon the switch. In backing up the train this car came in contact with the other three cars, but was subsequently pulled away from them some five or six feet. The switching crew then started to look for a knuckle with which to repair the defective coupler. Knuckles were kept in various places in the yard and the switchmen were accustomed to replace those found missing. Russell, the plaintiff's intestate, was the first to find one and he went in between the cars and attempted to adjust it in the coupling apparatus, but the pin would not fit and one of the other men went to look for another pin. Russell was holding the knuckle in place with his back to said three standing cars, when, without any apparent cause, they moved silently down and caught and crushed him, inflicting the injuries from which he died. The car in question was taken the next day on the easterly trip of said local freight train and hauled to Goshen, N. Y.

#### OPINION OF THE COURT.

NOYES, *Circuit Judge* (after making the foregoing statement) :

The first question in the case is whether the acts of the defendant constituted a violation of the Federal Safety Ap-

pliance Act (Act of March 2, 1893, as amended March 2, 1903), the relevant sections of which are printed in the footnote.<sup>a</sup>

The first phase of this question is whether the car with the defective coupler was, at the time of the accident, *in use* within the meaning of the amended act.

It is pointed out that the car was not being hauled at the time of the accident, but was standing upon a switch track for the insertion of the knuckle in the coupling apparatus, and it is contended that it was not then being used within the contemplation of the statute.

We think upon the authority of *Johnson v. Southern Pacific Co.* (196 U. S. 1), that this contention is not well founded. The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs. The insertion of the knuckle was a simple matter. The car was stopped only temporarily, and it was intended to couple it to the other cars as soon as repaired. These facts seem clearly to distinguish this case from those cases cited in the defendant's brief, where accidents occurred when cars had been sent to repair shops or placed upon dead tracks used for repair purposes.

The second phase of the question of the application of the act is whether the car at the time of the accident was employed in *interstate commerce*.

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<sup>a</sup> Act of 1893, sec. 2. That \* \* \* it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Amendment of 1903, sec. 1 \* \* \*. The provisions of \* \* \* (the Safety Appliance Act) \* \* \* shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab-irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. \* \* \*

The car itself does not appear to have been used in any interstate business at the time in question. It was hauled empty from a New York point to Port Jervis in the same state, and the following day in like condition was hauled to another New York point. But the test of the application of the statute is the train rather than the car, and we are of the opinion that there was evidence warranting a finding that the train in which his car moved into Port Jervis included other cars loaded with interstate shipments, and that the train in which it moved out of Port Jervis was of a similar character. Upon these facts it is held that the Safety Appliance Act applies. *United States v. International, etc., R. Co.* (174 Fed., 638); *Chicago, etc., R. Co. v. United States* (165 Fed., 423); *United States v. Wheeling, etc., R. Co.* (167 Fed., 198); *United States v. Erie R. Co.* (166 Fed., 352).

The fact that the accident occurred during switching operations and not during either the regular western or eastern movement of the freight trains does not affect the application of the statute. *Johnson v. Southern Pacific Co., supra*; *Wabash R. Co. v. United States* (168 Fed., 1). Certainly if the car came into Port Jervis in the afternoon in an interstate train and moved out of Port Jervis the next morning in another interstate train the character of its use was not changed during the switching operations at night. *Rosney v. Erie R. Co.* (135 Fed., 311) is distinguished, from the fact that in that case there was no proof of use in interstate commerce.

The second question of importance in the case is whether the trial court properly submitted to the jury the question whether the presence of the defective coupler was a proximate cause of the accident.

It is urged with much force that that which caused the injury to the plaintiff's interstate was the unexpected movement of the three cars—an act unrelated to and independent of the act of repairing the coupler. Indeed, were the question to be decided free of authority, a majority of the court would have difficulty in holding that the repair of the coupler was



a part of a coupling operation, and bore such a relation to the impact of the cars that the necessity for such repairs was an efficient cause of the accident.

But still the reason why Russell went to the place where he was injured was the defective coupler, and if he had not gone there the accident would not have occurred. Moreover, it appears that it was intended to couple the car with the defective coupler to the standing cars as soon as the coupler should be repaired. This being true, and in view of the desirability of uniformity in the decisions of the courts of the different circuits in interpreting this act, we feel it our duty to follow the decision of the Circuit Court of Appeals for the Eighth Circuit in Chicago, etc., *R. Co. v. Voelker* (129 Fed., 522). The facts in that case are very similar to those appearing here. The person injured went upon the track to adjust a defective coupler in a car when without warning, another car was shoved down upon him, inflicting the injuries complained of. It was held that the defective coupler was a proximate cause of the accident.

In Chicago Junction *R. Co. v. King* (169 Fed., 372), the facts even more closely resembled those appearing here, and a judgment for a person injured by reason of a defective coupler was affirmed, although the question of proximate cause does not appear to have been particularly considered. See also the decision of this court in *Donegan v. Baltimore, etc., R. Co.* (165 Fed., 869).

The third question in the case is whether the plaintiff's intestate was, as a matter of law, guilty of contributory negligence.

An affirmative answer to this question requires the assumption that the cars which moved down and against Russell moved because he had failed in his duty to brake or block them. But this assumption cannot be made. The cars may have been properly blocked and the blocks loosened by the impact with the car in question shortly before the accident. The question of contributory negligence was one for the jury.

The remaining questions raised by the defendant disclose no prejudicial error.

The judgment of the circuit court is affirmed.

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UNITED STATES v. BALTIMORE & OHIO RAILROAD  
COMPANY.

(In the District Court of the United States for the District of Indiana.)

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*Decided December 13, 1910.*

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(Syllabus.)

1. If the uncoupling chain on a car coupler is so long that in the ordinary usage of the same chain will become kinked in the head of the coupler in such a manner as to necessitate a man or men going between the ends of the cars to couple or uncouple, then such coupler is not equipped in compliance with the Federal Safety Appliance Act.
2. Two witnesses for the plaintiff having testified to the fact that a grab iron was missing from a car at a certain time, and one witness for the defendant having testified that at a subsequent time the same car had such a grab iron, the jury were instructed that the statements of said witnesses could be reconciled and that it was their duty to reconcile them and to find that no witness had testified falsely as to the matter.

CHARLES W. MILLER, *United States attorney*; CLARENCE W. NICHOLS, *assistant United States attorney*; and ROSCOE F. WALTER, *special assistant United States attorney*, for plaintiff.

SAMUEL MILLER, for defendant.

INSTRUCTIONS TO THE JURY.

ANDERSON, *District Judge* (orally) :

Gentlemen of the jury, this is a civil action, and in this court you are the judges of the weight of the evidence and of the credibility of the witnesses; you are to determine the facts proved, but you are bound by the law as it is given to you by the court.

The question you have to try is within a very narrow compass. In the first place, you have only to consider, as far as your deliberations are concerned, but three of the counts or paragraphs of this complaint, i. e., counts 2, 5, and 7. The defendant concedes that the Government has made its case as to counts 1, 3, 4, 6, and 8, and only raises a question as to counts 2, 5, and 7.

I will call your attention to these counts 2, 5, and 7, the ones that you will have to consider. In substance count 2 alleges that in violation of the Act of Congress known as the Safety Appliance Act, passed at a particular time and amended, said defendant on or about November 19, 1908, hauled on its line of railroad, Chicago, Lake Shore & Eastern, car No. 10364 consigned to a point within the state of Pennsylvania. The complaint further alleges that on or about said date the defendant hauled said car from Garrett, in the state of Indiana, in an easterly direction, within the jurisdiction of this court. As to these facts there is no dispute. The complaint then alleges that when the car was thus being hauled "the coupling and uncoupling apparatus on the 'A' end of said car was out of repair and inoperative, the uncoupling chain being kinked on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact," etc., alleging that this was done in violation of the statute.

Count 5, after alleging the statute, proceeds to aver that the defendant on or about November 19, 1908, "hauled on its line of railroad one car, to-wit, its own, No. 41861, said car being one regularly used in the movement of interstate traffic and at the time of said violation hauled in train containing interstate traffic; one car in said train, to-wit, Chicago, Milwaukee & St. Paul, No. 32514, containing interstate traffic, to-wit, flour consigned to a point within the state of Virginia." You will have no trouble about any of these questions. There is no dispute about them.

Count 5 further alleges "that on or about said date defendant hauled said car, its own, No. 41861, as aforesaid, over its line of railroad from Garrett, in the state of Indiana, in an easterly direction, within the jurisdiction of this court." There is no dispute about that fact.

Count 5 then alleges that while the car was thus being hauled "the coupling and uncoupling apparatus on the 'B' end of said car was out of repair and inoperative, the top clevis to the uncoupling chain being missing on said end of said car." Now, the only question for you to determine under count 5 is whether that top clevis was missing.

Count 7, after averring that the defendant hauled over its line Mobile & Ohio car No. 8721, used in the movement of interstate traffic, to-wit, coal, consigned to a point in Illinois, and that the defendant hauled the said car from Garrett in a westerly direction, avers that the grab-iron or handhold on the left-hand side of the "A" end of the car was missing; and that is the only question that you have to determine on that count.

So that the only question under count 2 is: Was the coupling defective by reason of the kinked chain, as averred? Under count 5: Was the top clevis of the uncoupling chain missing on that car? And under count 7 the only question for you to determine is: Was the grab-iron, as averred, missing?

The statute, section 2, provides that after a certain date: "It shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars;" and as to the grab-irons, from and after the same date: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

These two sections cover the three counts that you will have to consider. The first section that I read to you covers the first two, and the second section covers the last count; that is, count 7.

Now, as I have said, there is not any question about these cars being used in interstate commerce. There is not any question about the railroad company being engaged in interstate commerce. The only questions for you to determine are, as I have indicated, as to the defective couplers under counts 2 and 5 and the missing grab-iron under count 7.

Now, gentlemen of the jury, as I have said, you are the judges of the weight of the evidence and the credibility of the witnesses. You are to determine what the facts proved are. You are bound by the law as it is given to you by the court. This is a civil action. Before the Government can recover it must establish all the material allegations of the counts by a fair preponderance of the evidence. By a fair preponderance of the evidence is meant the greatest weight of the evidence; not necessarily a greater number of witnesses. In determining the weight which you will give to the testimony of any witness who has appeared before you, you will take into consideration his intelligence or want of intelligence, his opportunity to know the facts about which he testifies, and his interest, if any, in the result of the suit; and, having taken these things into consideration, it is for you to determine which witness you will believe and which witness you will not believe.

If you find for the plaintiff on the three counts that are in issue, then your verdict should be: We, the jury, find for the plaintiff, which will cover the whole eight counts. If you find that the Government has not by a fair preponderance of the evidence sustained either counts 2, 5, or 7, then your verdict should be: We, the jury, find for the plaintiff on the five counts I have spoken about, as to which there is no dispute, namely, counts 1, 3, 4, 6, and 8, and such others as you find the Government has established, or find in favor of the



defendant, on such of counts 2, 5, or 7, as you believe the Government has failed to establish.

Now, gentlemen, I have said to you that you are the exclusive judges of the facts proved and of the credibility of the witnesses, but on account of the number of counts here, and on account of the questions presented here, about which there is no dispute, I think it is proper that I should explain to you what I think about the evidence as to these counts 2, 5, and 7, explaining to you that you are not bound by anything I may say as to questions of fact.

You will notice that the first count about which there is any dispute, count 2, is the one which alleges that there was a kinked chain. You will recall the testimony in regard to that. The Government's witness says that he saw that chain kinked; that he undertook to manipulate that brake and found it was impossible because of the kink. On the other hand, one witness for the defendant, as I recall, testified that the chain was too long, and it did kink, but that he succeeded in pulling it out. Now, it is not difficult for a person who is used to weighing evidence to determine where the truth lies there, and you do not have to impute perjury to anybody. The witnesses for the railroad, themselves, testified that the chain kinked because it was too long, which, to my mind, is evidence sufficient to sustain the verdict on that count—to sustain a finding that the coupling was defective, and was not such a coupling as would uncouple by this appliance without the necessity of a man going in between the cars. But that question is for you to decide. You may conclude to believe the witnesses for the defendant and disbelieve the witnesses for the Government, if you see fit to do so, or if in your judgment it is your duty to do so, then your verdict should be for the defendant on that count. That, of course, depends simply on the question which witnesses you believe and which you will not believe.

When it comes to the clevis matter alleged in count 5, I will call your attention to the fact that the averment in

count 5 is that the clevis was gone, was missing, and two witnesses for the Government testified to that fact. Now, the testimony of the witness on the part of the defendant was that he supplied a bolt in the clevis. That does not meet the case of the Government at all, in my judgment. It is for you to decide.

Next, as to the missing grab-iron. If I understand the testimony, the two witnesses for the Government testified positively that this grab-iron was gone, was missing; that there was no grab-iron when it was moved over the line from the yards in interstate commerce. The only testimony, as I understand it—I may be mistaken about that—on the part of the defendant is that at a subsequent time, when some witness for the railroad company examined this car, it had a grab-iron. Of course, these two statements can be entirely reconciled, and it is your duty to reconcile them and, in that event, to find that no witness has testified falsely about it. It may be that there was no grab-iron on the car when it left Garrett and that there was a grabiron on it at the time this witness testified he saw it.

On account of the number of counts and the possibility of some confusion about them, I thought it was my duty to explain to you just what the situation is as to these three counts, reminding you again that it is for you to decide the facts. You do not have to take my view of what the facts are. You are bound by what the court says as to the law; but you must determine the facts without reference to what the court thinks about the evidence.

So, if you, in view of these instructions, find that the Government has, by the fair preponderance of the evidence—that is, by the greater weight of the evidence—proved the material allegations of counts 2, 5, and 7, which relate, respectively, to the kink in the chain, the missing clevis, and the missing grab-iron, then your verdict should be: We, the jury, find the defendant guilty. If you find that the Government has failed to establish the facts as to either counts 2, 5, or 7, then your verdict should be: We, the jury, find the

defendant guilty on those five counts I have mentioned, and such of those three counts as you find the defendant guilty, and not guilty on such counts as you find the Government has failed to prove to your satisfaction by a fair preponderance of the evidence.

Forms of verdict will be sent out with you.

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P. E. DAILEY *v.* SOUTHERN RAILWAY COMPANY.

(In the Circuit Court of the United States for the Eastern District of Tennessee.)

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*Decided January 10, 1911.*

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1. Liability of defendant because it used cars having bumpers when plaintiff was injured can not be considered by the jury, because the record herein disclosed that plaintiff had full knowledge of this fact, and under the doctrine of assumption of risk could not recover; and the rule of defendant that employees must not go between cars while they are in motion should be disregarded here, because the evidence shows that plaintiff was not injured by reason of moving cars.
2. The burden of proof herein is upon plaintiff to show: (a) That the interstate car on which he was hurt would not uncouple without a man going between the cars; (b) that such coupler would not work when operated in a proper way; and (c) that the failure of the coupler to work was the proximate cause of the injury. Under such state of facts defendant's failure to have a coupler equipped according to the Federal Safety Appliance Acts would be an act of negligence.
3. If plaintiff in the discharge of his duty went between the cars on account of the defective coupling in order to make the coupling and was injured, defendant would be liable; but not so if plaintiff went between the cars in order to turn a safety cock.
4. If the fact that a coupler does not work, as required by the Safety Appliance Acts, is due to some temporary condition in which the car is placed with reference to other cars, or to the movement of the car or of the train, which could not be avoided in the highest state of the art, the mere fact that the coupler would not work under those conditions would not render defendant liable; but the burden of proving such conditions would be on defendant.
5. While the Safety Appliance Acts prohibit assumption of risk as a defense, the defense of contributory negligence has not been taken

away. Those acts do not excuse an employee from a failure to use ordinary prudence in his own behalf, where he knows of the absence of the proper appliances. After having knowledge that the appliances are not in the condition required by the Safety Appliance Acts, if the employee is guilty of contributory negligence, which operates as one of the direct causes of the injury which he receives, then he cannot recover.

6. Contributory negligence defeats any recovery at all; it does not cut down or decrease the amount of the verdict, except in certain cases not involved here; but the burden of proof in contributory negligence is on defendant.
7. When plaintiff shows that the appliances were defective and in violation of the Safety Appliance Acts, it is not incumbent upon him to go further and point out in what respect the appliances were defective or out of repair.

WEBB & BAKER, for plaintiff.

JOUROLMON, WELCKER & SMITH, for defendant.

#### INSTRUCTIONS TO JURY.

SANFORD, *District Judge* (charging jury):

The plaintiff, Perry E. Dailey, sues the defendant for personal injuries, which he received in the year 1908 while in the employ of the defendant company. The defendant has moved the court for peremptory instructions. That motion, I neglected to say, is overruled, and I submit the case to the jury in certain aspects of the case. In doing so I wish to say, however, that my action in overruling this motion is not intended to be taken by you as meaning that the plaintiff is entitled to a recovery. It merely means that there is such a conflict in the evidence that I think it is a question to be passed upon by the jury instead of the court.

In so far as the plaintiff seeks a recovery on account of the fact that there were bumpers on the car, I withdraw that question from your consideration; that is to say, I charge you that under the undisputed evidence, if there be any evidence of negligence on the part of the defendant in regard to the bumpers, the same evidence would also show that the



plaintiff had full knowledge of its having cars on its line with bumpers, and, under the doctrine of assumption of risk, he would be held to have assumed that risk, and consequently could not recover on that ground. So you will eliminate from consideration any question of liability in so far as relates to the bumpers on this car. Also as to the question presented by counsel with reference to the rule of the company, being general rule No. 10. This rule has no application to the facts in this case, as it is in proof that this plaintiff did not go in between the cars while in motion and that he was not injured by reason of the motion of the engine, and you may hence disregard that rule in your consideration of the case.

I do, however, submit the case to you on the question of the Safety Appliance Act.

There are three questions that arise under this proof that are to be passed upon by you—that is, if you find some of them in favor of the plaintiff you may have to pass upon all of them, but if you find some of them in favor of the defendant you will not have to do so.

I will give you these questions in the order in which they should be considered.

In the first place, however, I will say that this suit being a civil case the duty is on the plaintiff to make out his case by a preponderance of the evidence. The rule is not the same in civil as in criminal cases, wherein the case must be made out beyond a reasonable **doubt**, but the plaintiff must establish his case by a preponderance of the evidence. And by a preponderance is meant that he must make out his case by the greater weight of the evidence, to be determined not merely by the relative number of witnesses testifying as to any particular fact, but by the weight or value of the evidence as it satisfies your minds. Unless, therefore, upon a consideration of the whole evidence, you believe that the plaintiff has established the material facts necessary to make out his case by a preponderance of the evidence, your verdict should be for the defendant; and if you believe either that the weight



of the evidence is equally balanced, or that it preponderates in favor of the defendant, then your verdict should be for the defendant.

In the first place, the plaintiff must prove by the greater weight of the evidence that there was a violation of the Safety Appliance Act. The Safety Appliance Act enacted by Congress, that is, the original act of 1893, provides that it shall be unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars;" and by the amendment of 1903 it is provided that this provision and requirement shall apply to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, \* \* \* and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

Now, it is undisputed in this case that those cars, especially this Erie car, a car on which the plaintiff was hurt, that is, one of them, was a car that had interstate freight in it; it was going from either some point up in Virginia or Tennessee to Georgia. The Southern Railway Company is an interstate carrier, and it was hauling interstate traffic in this train, and it was its duty to have the cars in that train, especially this Erie car, equipped with automatic couplers in compliance with the Safety Appliance Act, and it ought to have had couplers on that car such as could be coupled and uncoupled without the necessity of the men going between the ends of the cars to perform the work.

Now, the first thing that the plaintiff has to prove by the greater weight of the evidence is that there was a coupler on that car which would not uncouple without the men going between the cars. If the plaintiff fails to prove that by the greater weight of the evidence, he fails in his case. Now, he says that it would not uncouple by working the lever; that he tried it several times and that the lever would not work

and the car would not uncouple. Now, the first thing for your consideration is whether, from the weight of the evidence, you believe that statement. The defendant relies on the evidence of the conductor, who, after the accident, tried this lever and it worked all right, as he states, and that he, as a matter of fact, from his testimony uncoupled the car; and of the inspector, who says that a little bit later on he worked the lever and it worked all right, although at the time he worked it the car was not coupled to the other car. Now, the first question you have to determine is whether or not it is a fact that the coupler would not work, and if you find as a matter of fact that it would not work, that the plaintiff tried to make it work, but that it would not work, of course the next question for you to consider is whether he tried to work it in the proper way. If it would not work because he did not operate it in the proper way, of course there would be no liability on the part of the railway company in that regard. But if he tried to work it in the proper way and it would not work, if you find that to be the case, then I charge you that the burden of proof would shift, and that would raise the presumption that there was something wrong with that coupler, and then the burden of proof would be on the defendant to show why that state of facts existed and to explain it.

Now I charge you that if a coupler does not work in every instance, and if the fact that it does not work is due to some temporary condition in which the car is placed with reference to other cars, or the movement of the car or of the train in which it is placed, which is a condition that will happen in any coupler, and which can not be avoided in the highest state of the art, the mere fact that it would not work under those conditions would not render the company liable. But upon that ground the burden of proof rests on the company, if you think that it would not work when operated in the proper way, to show that the coupler was of the highest state of the art and that the reason that it would not work was that it was impossible to have a coupler that would work

in that condition. On that question the burden of proof would be on the railway company, if you believe from the evidence that the coupler would not work when properly operated.

If you find in favor of the plaintiff that the coupler would not work, and find that the defendant failed to show that it had a coupler up to the highest standard, and to explain its failure to work in the manner I have indicated, the next duty devolving upon the plaintiff to entitle him to a recovery is to show that the failure of the coupler to work was the proximate cause of the injury. It is not disputed that he was working in between those two cars, and the failure to have a coupler equipped according to the Safety Appliance Act would be an act of negligence. But an act of negligence does not make the company responsible for an injury which does not result from the act of negligence in such sense that the company's negligence is the proximate cause of the injury. Ordinarily when an injury is the natural and probable consequence of negligence, or a wrongful act such as the violation of a statute, and ought to have been foreseen in the light of the attending circumstances, and there is no intervening or independent cause, such negligence or wrongful act is said to be the proximate cause of the injury. And where carelessness or negligence in the bringing about, for example, of a dangerous condition, or unlawful condition, is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, such intervention will not excuse the original wrongdoer, and the subsequent mischief will be held to be the result of the original misconduct.

In other words, it will be your duty to determine whether it was a natural and probable consequence of having a car in such condition, in violation of the Safety Appliance Act, if you find it was in such condition, that an employee in the discharge of his duty would be injured in going between two cars in making a coupling which he was required to do because of the defective condition of the coupler.

In such case, if you find it to be the natural and probable consequence of having a coupling apparatus in a condition that it would not work and that an employee in the discharge of his duty on account of the defective coupling would have to go in between the cars to make the coupling, then you would be justified in regarding the defective condition of the coupling as a proximate cause of the resulting injury to the employee, provided he went between the cars for the purpose of making a coupling or uncoupling. And in that aspect of the case, in determining whether the condition of the coupling was the proximate cause of the injury, you would have to determine, as a material matter, whether he was making the uncoupling or whether he went there between the cars to turn the safety cock. It might well be a consequence to be foreseen and guarded against of having a coupling in a defective condition that a man would have to go between the cars to make a coupling or uncoupling, but it would not follow at all that from having a coupling in a defective condition a man would go between the cars for the purpose of turning the safety cock if he would have to go in between the cars to turn the safety cock regardless of the question of whether the coupler worked or not. In other words, if he would have to go between the cars to turn the safety cock whether the coupling was working or not, then it is clear that whatever the condition of the coupling was it would not involve liability as a result of going between the cars, not to handle the coupling, but to turn the safety cock. So that you will have to find the object for which he went between those cars.

Now, if you find that the coupler was defective, that the condition of the coupler was the proximate cause of the accident, the defendant still says that it would not be liable, because the plaintiff was guilty of contributory negligence.

Now, while the Safety Appliance Act provides that the employee does assume the risk of using the defective appliance itself, it has been held that it does not take away from the company the defense of contributory negligence. That is, the statute does not excuse the employee from a failure to use



ordinary prudence in his own behalf, where he knows of the absence of the proper appliances, and if the employee, after having knowledge that the appliances were not in the condition required by the statute, he himself is guilty of contributory negligence, which operates as one of the direct causes of the injury which he receives, then he cannot recover.

Now, to take an extreme case, simply to illustrate the distinction: If an employee knows that there are no automatic couplers on the cars, but should attempt, with knowledge of that fact, to go in between two cars on a rapidly moving train to make a coupling, say a train running at the rate of 20 miles an hour, or when the cars are moving so fast that an ordinarily prudent man with due regard for his own safety would not go between the cars to make a coupling at that time, he would obviously be guilty of contributory negligence, which would bar a recovery, although he did not assume the general risk of continuing in the service of the company with the knowledge of the fact that there were no automatic couplers on the car. So, then, the question would be, if you find in favor of the plaintiff on the first two propositions, was the plaintiff, with the knowledge he had of the conditions, guilty of contributory negligence in going between the cars at that time?

Now, contributory negligence is a failure on the part of a man to exercise that amount of care which, under the circumstances, might be reasonably expected of an ordinarily prudent person, and whenever a plaintiff himself so far contributed to his injury by his own negligence or want of ordinary care or caution that but for such neglect or want of ordinary care and caution on his part the accident would not have happened, then he is guilty of contributory negligence and cannot recover.

The test of his contributory negligence is the care that an ordinarily prudent man, similarly situated, under the same circumstances, with like knowledge of the conditions, would have exercised in his own behalf, and a failure to use such care, operating as a direct cause of the injury, is contribu-



tory negligence. If, however, gentlemen, the danger, although present or appreciated, is one which many men are in the habit of assuming, and which prudent men who earn a living are willing to assume for extra compensation, and if the person assuming such risk, having in view the risk of the dangers thus assumed, while assuming it, still uses care reasonable and commensurate with the risks to avoid injurious consequences, he is not guilty of contributory negligence. But if an employee, who knows the danger while assuming the risk, does not use such care in his own behalf, and by reason of the failure to use such care suffers injury, he is guilty of contributory negligence, and cannot recover, even though the negligence of the employer in violating the statute was also a cause of the injury.

So, then, you should determine this question. If there would otherwise be a case against the defendant on account of the violation of the statute, still would an ordinarily prudent man situated as this plaintiff was, and with a knowledge of those conditions of the liability of the car to come back after the cars had been backed up a slight grade—would an ordinarily prudent man have gone in between those cars to make that coupling? Or, if an ordinarily prudent man, earning his living as this plaintiff was, and in view of the risks which were assumed by him, if an ordinarily prudent man would have gone in between the cars at all, would he have gone in in the way that this plaintiff did, and would he have placed himself in the position with reference to the bumpers and the cars that this plaintiff did? That is, did the plaintiff take care of himself under these circumstances, in going between these cars, first, with reference to going in at all, and second, with reference to the position of his body and arms after he went in there that an ordinarily prudent man would have done, with due regard to his own safety?

A man must exercise ordinary care for himself and for the preservation of his own life, and if he fails to exercise that ordinary care that a reasonably prudent man would, and that is one of the causes of the injury received, he cannot

recover, no matter what the negligence of the defendant may have been.

Or, that question the burden of proof is on the defendant, and it must establish the want of care either in going in at all, or in the way he conducted himself after going in; it must establish that want of care by a preponderance, or a greater weight of the evidence. On the first two propositions, that the company was not operating in compliance with the Safety Appliance Act, if that be the case, and if that be, that this was a proximate cause of plaintiff's injury, the burden of proof is on the plaintiff. His proof on that subject must outweigh the defendant's proof. But if you get to the other proposition then the burden of proof shifts, and the defendant is required to establish by the greater weight of the evidence the fact of plaintiff's contributory negligence. But if it does establish it, there can be no recovery. It would not be a question of cutting down the amount of damages. Contributory negligence defeats any recovery at all; it does not cut down or decrease the amount of the verdict, except in certain cases not involved here.

If you find in favor of the plaintiff, it would be your duty to assess his damages. The damages which you would assess should be compensatory. In doing this, you should consider all the circumstances connected with the plaintiff, his age, his earning capacity, his habits, his prospects of life, and of earning wages in life, the extent to which he has been deprived of earning a livelihood as a result of this injury, and of the means of earning a livelihood; if you find that he is entitled to a recovery at all, you should fix such sum as in your judgment would be a fair and just compensation for the injury received, as well as would be a fair and just compensation for the suffering, and the expenses to which he was put—the medical expenses—although I believe none were proven in this case. But if you find he is entitled to a recovery, you give such sum as will compensate for the suffering, the loss of time, and the decrease of his earning capacity.

You are the judges of the weight to be given to the testimony of the witnesses. You should consider their demeanor on the witness stand, their intelligence, their manner of testifying, the extent to which they are contradicted or corroborated by other witnesses, their candor, or lack of candor, interest, or lack of interest, in the result of this lawsuit, and the reasonableness of the story they tell, and then determine where, in your opinion, under the law, as given you, the truth of this case is to be found.

Verdict for plaintiff, \$5,000.

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No. 1007.

THE NORFOLK & WESTERN RAILWAY CO., PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

United States Circuit Court of Appeals, Fourth Circuit.)

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In error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

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*Argued February 15, 1911. Decided October 14, 1911.*

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1. ADMISSIBILITY IN EVIDENCE OF MODEL COUPLERS.

Where there is a question as to complicated machinery it is competent to use any model or drawing that may illustrate the condition of such machinery, so as to give the jury a clear and distinct idea as to the nature and character of the defect, in order that they may intelligently deal with the question submitted for their consideration. Citing cases.

2. ADMISSIBILITY OF IRRELEVANT QUESTION.

Question of defendant's counsel relative to an inspection other than that on which complaint was based: *Held*, Properly excluded.

3. ADMISSIBILITY OF RULES GOVERNING INSPECTIONS.

Where the purpose of the inspection was to secure evidence for prosecution: *Held*, That the rule of the Commission requiring inspectors in all other cases to make themselves known to company's employees was properly excluded.

## 4. NOTIFICATION OF RAILROAD AT TIME OF DISCOVERING DEFECT.

The court below properly held that inspectors need not notify defendants of the existence of defects at the time of their discovery. Citing cases.

## 5. REFUSAL OF COURT TO GRANT PRAYER COVERED BY OTHER INSTRUCTIONS.

Where the court refuses a prayer and then in its general charge or in another prayer covers the point in question, even though it erred in refusing the prayer, such error is not prejudicial, and is therefore harmless.

## 6. DEGREE OF DILIGENCE REQUIRED BY THE ACT.

The trial court properly refused to instruct the jury that "the law does not impose upon a railroad company the duty of an absolute insurer as to the perfect condition of such safety appliances at all times and under all conditions and circumstances." Citing cases.

WILLIAM A. GUTHRIE (THEODORE W. REACH on the brief), for the plaintiff in error.

H. F. SEAWELL, *United States attorney*, and PHILIP J. DOHERTY, *special assistant United States attorney* (ROSCOE F. WALTER, *special assistant United States attorney*, on the brief), for the defendant in error.

Before GOFF and PRITCHARD, *Circuit Judges*, and ROSE, *District Judge*.

## STATEMENT OF FACTS.

This is an action in debt begun by the United States to recover a penalty of \$100 incurred by the defendant in hauling a car not equipped as provided in the Safety Appliance Act of March 2, 1893, as amended by an act approved March 2, 1903.

The petition charged in substance that the defendant was a common carrier engaged in interstate commerce by railroad, and as such, on August 28, 1908, hauled on its line of railroad one car, to-wit, its own No. 20370, containing interstate traffic, to-wit, tobacco consigned to a point without the State of North Carolina. It further alleged that on said date the defendant hauled said traffic in said car from Durham, in the State of North Carolina, in a northerly direction, when

the coupling and uncoupling apparatus on the "B" end of the car was out of repair and inoperative, the uncoupling chain being kinked inside the coupler head on said end of said car, thus necessitating a man or men going between the ends of the cars.

The defendant answered and admitted that it was a common carrier engaged in interstate commerce, and that it hauled car N. & W. 20370 on the date alleged from Durham, in the State of North Carolina, and that this car was used in the movement of interstate traffic, but denied that the coupling and uncoupling apparatus on the "B" end of the said car was out of repair and inoperative as alleged in the petition. On May 31, 1910, there was a trial of this case before a jury on the following issue:

Was the coupling chain on the "B" end of N. & W. car No. 20370 kinked in the head of the coupler when said car left Durham, N. C., on August 28, 1908, and inoperative so that it required a man or men to go between the cars to couple and uncouple it, as is alleged in the petition?

The finding of the jury was in the affirmative, upon which finding judgment was entered against the defendant in the sum of \$100.

#### OPINION OF THE COURT.

PRITCHARD, *Circuit Judge*:

The first assignment of error is to the effect that the court below erred in allowing the plaintiff the use of models of the Climax and Tower couplers as a means of demonstrating his evidence while the Government witness, Cash, was being examined concerning the condition of the Major coupling, the kind with which the car in question was equipped. The model in question was used merely for the purpose of aiding the court and the jury in ascertaining as to whether there was any defect in the coupler, and it was admitted by the Government that this model was not exactly like the coupler attached to the car in question. It was not introduced in evidence, but the



court permitted the use of the same to illustrate the condition of the coupler just as maps and drawings are used in the trial of ejectment suits. It was contended by the Government that the chain was kinked in the coupler head, but there was no complaint as to the lock block. Mr. Cash, while on the witness stand, among other things, testified as follows:

Q. By means of this model you may explain to the court and the jury just what condition you found the coupling apparatus on the "B" end of this car?—A. We haven't here a Major coupler, but one of these is known as the Climax and the other the Tower. The Major coupler is made more on this order, on the order of the coupler [indicating] and the chain had gotten kinked in this position [indicating] in such a way that you couldn't get it far enough either way to get it out, and it was perfectly rigid.

Thus it will be seen that this model was used solely for the purpose of illustrating the exact condition of the chain at the time the inspection was made. Where, in a trial like the one at bar, there is a question as to complicated machinery, it is competent to use any model or drawing that may illustrate the condition of such machinery so as to give the jury a clear and distinct idea as to the nature and character of the defect in order that they may intelligently deal with the question that is submitted for their consideration.

Wigmore on Evidence, volume 1, section 791, contains the following statement as to the rule:

The use of models, maps, and diagrams as modes of conveying a witness's knowledge is illustrated in manifold rulings, as well as in the daily practice of trials.

Citing an instance in a trial in an English court. (*Watson's trial*, 32 How. St. Tr., 125.)

Also in the following cases this rule is announced: *Western Gas Company v. Danner* (97 Fed. Rep., 892); *Southern Pacific Co. v. Hall* (100 Fed. Rep., 760); *Dobson v. Whisenant*, (101 N. C., 645).

We think the action of the court below in permitting the use of models merely for the purpose of illustration was not prejudicial to the rights of the defendants.

The second objection is to the effect that the court below erred in sustaining the objection of counsel for the Government to the following question put to the Government inspector, Cash, on cross-examination.

I ask you if in one of your visits (to Lynchburg yards) on an inspection tour you did not find a car where the chain appeared to be kinked in the coupler head, and if you were not about to take a note of it when Mr. Clark and his assistant, Mr. Wingfield (the company's inspector), who were present in the yard, and if Mr. Clark did not take hold of the lever and by the lever alone shake the pin or chain that held the pin in proper position and you did not thereupon say, "This seems to be all right"—not this particular car in question but on another car?

This evidence, it appears, relates to a time and place different from that alleged in the declaration, and we cannot understand upon what theory it could have been offered as having any bearing whatever upon the issues involved in this controversy. In the first place, there is nothing to indicate what would have been the witness's answer, but in any event this testimony would not be competent. The witness was being cross-examined and it was purely within the discretion of the court as to whether he should be required to answer the question, inasmuch as it did not tend to throw light upon the issues raised by the pleadings, and we think the court very properly excluded the same.

The next point relates to the refusal of the court to permit the defendant to introduce a pamphlet marked "A. H. G. C." containing the rules of the department, upon the examination of witness Cash. That portion of the rules offered as evidence is in the following language:

I. In all inspections except in those intended to secure evidence of violation of the law, the inspector should make himself known to the foreman or other official of the mechanical department or in the absence of that officer, to the agent or other employee next in authority. In all cases have name and title of such officer or employee included in report of inspection. Whenever practicable the official found in charge should be invited to accompany or send a representative with the inspector, and the person so accompanying the inspector should have his attention drawn to all defects noted. The time of making inspections is to be shown on each report. \* \* \*

The object of these instructions is to call the attention of inspectors to certain rules to be observed in obtaining evidence upon which the

Government can successfully prosecute. Inspectors should enter upon the investigation of every case in a spirit of fairness and with a desire to perform their whole duty as officials of the Government, directed to aid in the execution and enforcement of the law.

It is provided by the foregoing that in any inspection, except those intended to secure evidence of violation of the law, that the inspector should make himself known to the officer in charge, or, in the absence of the agent, the next official in authority, and whenever practicable the official found in charge should be invited to accompany or send a representative with the inspector so as to have his attention called to any defects and the same noted. The next paragraph is explanatory of this rule, and, among other things, it is stated therein that the inspectors must observe the rules under which they operate and enter upon every investigation with a spirit of fairness and a desire to perform their whole duty as official directed to aid in the execution and enforcement of the law.

The real issue, as we have stated, in this case is as to whether the defendant violated the law by hauling over its road one of its cars the coupler of which was in a defective condition. It should be borne in mind that at this time the witness was engaged in the performance of his duties at Durham and was endeavoring to secure evidence of violation of the law and the exception to the rule is to the effect that in such cases he is not required to make himself known. The witness testified that on that occasion he was seeking evidence of violation of the law, and inasmuch as the evidence shows that the work in which he was engaged at that time brought him clearly within the exception of this rule, we fail to see how the rule and the instructions proposed to be introduced could have had any bearing upon the issue raised by the pleadings. Witness Cash, among other things, testified as follows:

Q. What was the purpose of your going to the yard of the Norfolk & Western that morning?—A. To see whether or not the Norfolk & Western was complying with the safety appliance law with reference to their equipment.

Inspector Cullinane also testified as follows:

Q. When you and Mr. Cash went there (to Durham, N. C., on August 28, 1908), you were making a general visitation to see whether or not you could find any violation of the safety appliance law?—A. Yes, sir.

Thus it clearly appears that the inspectors were acting strictly within the scope of their authority. Therefore the admission of this evidence would not have been competent in any view of the case—not even for the purpose of impeaching the witness. He testified that they were looking for violations of the law, and, as we have stated, the rule clearly provides that in such cases the inspector is not required to disclose his identity. Therefore we think the ruling of the court below as to this point was eminently proper.

It is also insisted that the court below erred in granting an instruction, at the request of counsel for the Government, to the effect that the Government inspector was under no legal obligation to inform the railroad company of defective cars. Congress by the enactment of the statute by virtue of which this suit was instituted evidently intended to hold the railroad companies to a high degree of diligence in equipping and maintaining their cars with the proper safety appliances. If it is the intention of the law that when an inspector goes from place to place and when he finds a car in a defective condition that it is his duty to notify the company of the same before the car is transported, then it would be impossible to secure anything like a fair enforcement of the law which penalizes the railroads for not properly equipping and maintaining their cars with safety appliances.

In the case of *United States v. So. Ry. Co.*, Kent's Index-Digest, 125, the court said:

Inspectors in the employ of the Interstate Commerce Commission are not required to inform the employees of the defendant, when they make the inspection of the cars sued upon, of the defects found in the appliances.

Also in the case of the *United States v. A., T. & S. F. Ry. Co.*, Kent's Index-Digest, 125, the court said:



The inspectors for the Government are not required to notify the employees of the railroad company of existing defects previous to or at the time of movement of defective cars.

Under the circumstances of this case, and in view of the requirements of the statute, we think the court did not err in granting this instruction.

It is also urged that the court erred in refusing to grant instruction No. 2, requested by the defendant. The instruction in question is in the following language:

If there is a mistake of fact as to the basis of the charge, the defendant is entitled to recover.

In this instruction no particular fact is referred to as having any bearing upon the controversy that was then being considered by the jury. It is simply an abstract proposition of law unaccompanied by any explanation as to its relevancy to the facts then being considered by the jury. However, the court submitted to the jury an instruction, which, though not in the same words, substantially covered the point sought to be raised by the instruction offered by the defendant. This instruction reads as follows:

You are instructed that if the uncoupling chain on the "B" end of the car N. & W. 20370 was so kinked in the coupler head that with reasonable effort a man could not operate the uncoupling apparatus on said end of said car without going between the ends of the cars, then such car was not in the condition required by law. If you believe from a preponderance of the evidence that said car was hauled out of Durham, in the State of North Carolina, on August 28, 1908, in such above-described condition, then it is your duty to answer the issue "Yes."

Here the court instructed the jury as to what constituted a violation of the law and further informed them that if they failed to find as a fact, by a preponderance of the evidence, that the car in question was hauled out of Durham, at the time mentioned in the petition, in a defective condition, that it was their duty to answer the issue in favor of the defendant. The point sought to be presented in the prayer as requested by the defendant was substantially covered in the general charge of the court to the jury. It has been repeatedly held that where the court refuses a prayer and then in its general



charge or in another prayer covers the point in question, that even though the court erred in refusing the prayer that such error was not prejudicial and therefore harmless.

It is contended by the defendant that the court erred in refusing to give instruction No. 8, which is in the following language:

The court further charges the jury that even though you find from the evidence that the chain was kinked in the coupler at the "B" end of N. & W. car No. 20370, on the yard of the defendant at Durham at the time the train was being made up and before it left the yard, and while the Government inspectors found it and inspected it, yet if the kink in the chain had become loosened and unkinked and righted before the train pulled out of the yard and left for Lynchburg, then your verdict should be in favor of the defendant railway company, and you should answer the issue accordingly.

The question raised by this instruction was sufficiently covered by instructions Nos. 4 and 5 of the defendants, which the court had already granted. These instructions are as follows:

That if the jury find from the evidence that N. & W. car No. 20370, described in the petition and admitted in the answer, was used in interstate commerce, but before starting on its interstate journey, after being loaded at Durham, N. C., with tobacco consigned to Norfolk, Va., it was carefully inspected at Durham, N. C., by a competent railroad coupler inspector employed by the defendant railroad company for that purpose, and the coupling and uncoupling apparatus on the "B" end of the car was not out of repair and was not inoperative, and the coupling chain was not kinked inside the coupler head on said end of the said car, then the jury should answer the issue joined in favor of the defendant and acquit the defendant of the charge.

That while the testimony of the defendant's witnesses who were car inspectors at Lynchburg, Va., and who testify that said N. & W. car No. 20370 was inspected on its aforesaid journey from Durham, N. C., via Lynchburg, Va., to Norfolk, Va., it is not by itself substantive evidence as to the condition of the car when it left Durham, N. C., yet it is admitted as competent evidence to be duly considered by the jury tending to corroborate the testimony of the defendant's witness, Car Inspector S. D. Johnson, who testified that he inspected this car at Durham, N. C., on the occasion complained of, and that the coupler chain was not kinked in the head of the coupler, nor out of repair, or inoperative.

It is also contended that the court erred in refusing to grant the instruction which raised the question as to the

degree of diligence required to be exercised by railroad companies to constitute a compliance with the Safety Appliance Acts. The instruction in question is in the following language :

But after a railroad company has performed such duty and equipped its cars with such automatic couplers, while the law requires the railroad company to exercise a high degree of care and diligence in keeping and maintaining such safety appliance in proper condition and repair, so far as by reasonable inspection from time to time it can be reasonably done, the law does not impose upon a railroad company the duty of an absolute insurer as to the perfect condition of such safety appliances at all times and under all conditions and circumstances.

This point was decided by the Supreme Court in the case of *St. L., I. M. & S. Ry. Co. v. Taylor* (210 U. S., 281) ; also by this court in the cases of the *Atlantic Coast Line R. Co. v. United States* (168 Fed. Rep., 175) and the *Norfolk & Western Ry. Co. v. United States* (177 Fed. Rep., 623). In the case of the *Atlantic Coast Line R. Co. v. United States* this court in referring to this phase of the question said :

To sustain the contention of the defendant company as to the proper construction to be placed upon the provisions of this act would be to render the act nugatory, while, on the other hand, if we construe it in accordance with the well established rules in such cases, we afford life and vitality to the law, and thus give expression to the legislative will. In other words, if Congress had the power in the first instance to legislate so as to regulate the conduct of railroads for the protection of employees and in the interest of the traveling public, then it must be admitted that it has not, in the passage of this law, transcended its limitation, and any construction short of holding the act to be absolute would leave undisturbed the situation as it existed prior to its enactment, and it would be difficult to imagine a state of facts upon which railroads would be liable for a penalty or where an employee would be able to recover in an action instituted to recover damages for injuries incurred on account of failure to perform the duties imposed by the statute. It was the manifest intention of Congress, in the enactment of this statute, to require all common carriers engaged in interstate commerce to keep their cars and engines at all times equipped with proper safety appliances. The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional. Therefore any failure on the part of a railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed.

The foregoing is in harmony with the recent decision of the Supreme Court in the cases of *E. M. Delk v. St. Louis & S. F.*

R. Co. (220 U. S., 580) and the Chicago, Burlington & Quincy R. Co. v. United States (220 U. S., 559), decided May 15, 1911, expressly affirming the rule announced in the case of St. Louis, I. M. & S. Ry. Co. v. Taylor, *supra*.

For the reasons stated the judgment of the lower court is affirmed.

## UNITED STATES v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY CO.

(In the United States District Court for the District of Montana.)

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*Decided May 2, 1911.*

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Where the coupler on the front end of a locomotive engine is defective in that the height of the drawbar is below the minimum provided for in the Safety Appliance Act, it is a violation of the statute to use such engine in interstate commerce even though the coupler is so defective that a reasonably prudent man would not undertake to make a coupling, and even though no use is shown of the defective coupler, but the end of the locomotive engine which is not defective is employed in making the movement. The purpose of the statute is to protect the lives and safety of all employees, whether they are reasonably prudent or not.

### STATEMENT OF FACTS.

The petition filed by the Government in this case charged that on January 10, 1910, the defendant used its locomotive engine No. 1163 in interstate traffic when the height of the drawbar on the front end was only 30 inches, being below the minimum provided for by the Safety Appliance Act.

The evidence showed that when first seen by the Government inspectors the front end of the locomotive engine was coupled to a string of cars and that, owing to the low drawbar, the engine broke away from the cars when an attempt was made to haul them. The engine was taken to the roundhouse, put on the turntable, and brought out in the yards and put in service again, but there was no evidence of any actual use of the defective coupler after that time.

It was contended by the defendant that the coupler was in such a condition that no reasonably prudent man would attempt to use it. On the other hand, it was contended by the Government that the purpose of the Act was to protect the less prudent man who might, in case of emergency, be tempted to take chances.

INSTRUCTIONS TO JURY.

DIETRICH, *District Judge* (charging jury) :

Gentlemen of the jury, by the undisputed evidence in this case, no issue of fact is left for your consideration. As I view the law, it is illegal for a railroad company to use an engine in the condition in which this engine undoubtedly was, even though the defective end was not actually employed. By the law it was intended to prohibit a railroad company from using a car or engine having a defective coupler only upon one end, even though that coupler was so defective that a reasonably prudent man would not undertake to make a coupling therewith. The law was intended to protect the lives and safety of all employees, whether they are reasonably prudent or not. As I view it, an engine in the condition in which this was was a possible source of great danger, in that if an employee were standing upon the footboard and the head of the defective coupler was so low as not to engage with the coupler upon a car in proper condition, thus permitting the two cars to come close together, the employee might be crushed. Or, upon the other hand, an employee of little experience or caution might undertake, in case of emergency, to couple the defective coupling with that of another car, and thus imperil his safety or his life. In that view I have excluded the testimony offered on behalf of the defendant and declined to give certain requested instructions, and it becomes your duty to find a verdict in favor of the plaintiff in accordance with the prayer of the complaint.

## APPENDIX H.

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### STATE STATUTES.

#### CALIFORNIA.

[Statute 1911, p. 796.]

SECTION 1. "In any action to recover damages for a personal injury sustained by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

(1) "That the employee either expressly or impliedly assumed the risk of the hazard complained of.

(2) "That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

SECTION 2. "No contract, rule or regulation, shall exempt the employer from any of the provisions of the preceding section of this Act."



## FLORIDA.

From General Statute 1906.

SECTION 3148. *Liability of railroad company.* "A railroad company shall be liable for any damages done to persons, stock or other property, by the running of the locomotive, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

SECTION 3149. *When recovery of damages forbidden.* "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the company and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him."

SECTION 3150. *Liability for injury to employee.* "If any person be injured by a railroad company by the running of the locomotives or cars, or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding." [Acts 1891, Ch. 4071, § 1.]

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IOWA.

[Code 1907, § 2071, as amended by Acts 1911, p. 117.]

SECTION 2071. "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the

neglect of the agents, or by any mismanagement of the engineers, or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section: but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received.” [The following was added in 1911.] “That in all actions hereafter brought against any such corporation to recover damages for the personal injury or death of any employee under or by virtue of the provisions of this section, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or corporation of any statute enacted for the safety of employees contributed to the injury or death of such employee: nor shall it be any defense to such action that the employee who was injured or killed assumed the risks of his employment.”

## MICHIGAN.

[Public Acts 1909, p. 210.]

SECTION 1. "Every common carrier railroad company in this state shall be liable to any of its employees, or, in case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin, for all damages which may result from the negligence of any such railroad company or from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to the negligence of any such common carrier railroad company in its cars, engines, appliances, machinery, track, roadbeds, works, boats, wharves, coal docks or other equipment."

SECTION 2. "In all actions hereinafter brought against any such common carrier railroad company under or by virtue of any of the provisions of this Act to recover damages for personal injury to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery: *Provided*, That the negligence of such employee was of a lesser degree than the negligence of such company, its officers, agents or employees: *Provided further*, That no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier railroad company of any statute enacted for the safety of employees contributed to the injury of such employee, and such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

SECTION 3. "The words 'railroad company,' as used in this Act, shall be taken to embrace any company, association, corporation, or person managing, maintaining, operating, or in possession of a common carrier railroad in whole or in part

within this state, whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

SECTION 4. "No contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief, benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of such employee: *Provided, however,* That upon the trial of such action, the defendant may set off therein any sum it has contributed toward any such insurance, relief, benefit or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative."

SECTION 5. "No action shall be maintained under this Act unless commenced within two years from the time the cause of action occurred."

SECTION 6. "Nothing in this Act shall be held to limit the duty of common carrier railroad companies, or impair the rights of their employees under existing laws of the state."

SECTION 7. "The provisions of this Act shall not apply to employees working in shops or offices."

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## MONTANA.

[Laws 1911, p. 47.]

SECTION 1. "Every person or corporation operating a railroad in this state shall be liable in damages to any person suffering injury while he is employed by such person or corporation so operating any such railroad, or, in case of the death of such employee, instantaneously or otherwise, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employees, for such injury or death resulting in whole or in part from the negli-

gence of any of the officers, agents, or employees of such person or corporation so operating such railroad in or about the handling, movement or operation of any train, engine or cars, on or over such railroad, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

SECTION 2. "In all actions hereafter brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this Act, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such person or corporation so operating such railroad of any statute for the safety of employees contributed to the injury or death of such employee."

SECTION 3. "Any employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment when such risk arises by reason of the negligence of the employer or of any person in the service of such employer."

SECTION 4. "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any such person or corporation so operating such railroad to exempt itself from any liability created by this Act shall, to that extent, be void: *Provided*, That in any action brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this Act, such person or corporation may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or to the persons entitled thereto, on account of the injury or death for which said action is brought."



## NEBRASKA.

[From Cobbey's Ann. Stat. 1911.]

SECTION 10591. *Liability of company for injury or death.* "That every railway company operating a railway engine, or a train in the state of Nebraska, shall be liable to any of its employees, who at the time of injury are engaged in construction or repair work or in the use and operation of any engine, car or train for said company, or, in the case of his death, to his personal representatives for the benefit of his widow and children; if any, if none, then to his parents; if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." [Laws 1907, Ch. 48, p. 191, § 1.]

SECTION 10592. *Contributory negligence, not a bar.* "That in all actions hereafter brought against any railway company to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, all questions of negligence and contributory negligence shall be for the jury." [Laws 1907, Ch. 48, p. 192, § 2.]

SECTION 10593. *Insurance or relief contract not bar to recovery.* "That no contract of employment, insurance, relief, benefit, or indemnity for injury or death hereafter entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief, benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon

the trial of such action against any common carrier the defendant may set off any sum it has contributed toward any such insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative." [Laws 1907, Ch. 48, p. 192, § 3.]

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## NEVADA.

[Statutes 1911, p. 362.]

SECTION 1. "If in any employment to which this Act applies personal injury disabling a workman from his regular service for more than ten days, or death by accident, arising out of and in course of employment is caused to a workman, the workman so injured, or in case of death, the members of his family, as hereinafter defined, shall be entitled to receive from his employer, and the said employer shall be liable to pay, the compensation provided for in this Act: *Provided*, That recovery hereunder shall not be barred where such employee may have been guilty of contributory negligence where such contributory negligence is slight and that of the employer is gross in comparison, but in which event the compensation may be diminished in proportion to the amount of negligence attributed to such employee, and it shall be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense: (1) That the employee either expressly or impliedly assumed the risk of the hazard complained of; (2) that the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. No contract, rule, or regulation shall exempt the employer from any of the provisions of the preceding section of this Act."

NOTE.—The remainder of this statute defines "employer" and "employee" as used in the statute and provides for the compensation of such employees when injured. It is based on the English Compensation Act.

## NEW JERSEY.

[Laws 1911, p. 134.]

SECTION 1. "When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employee was himself not wilfully negligent at the time of receiving such injury, and the question of whether the employee was wilfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence."

NOTE.—The remainder of the statute forbids contracts waiving a right to damages in case of injuries, casting the burden on defendant to show "wilful negligence" in the employee; and provides provisions for compensation, similar to the English Compensation Act. Naturally the question arises, what is "wilful" negligence? Louisville, N. A. & C. Ry. Co. v. Bryor, 107 Ohio 51; —N. E. —.

## OHIO.

[Acts of Ohio, 1910, p. 195.]

In 1910 the Ohio Legislature adopted a statute which applies to any employer, fixing a liability for negligence, abolishing the rule of fellow-servant in many instances, and abolishing assumption of risk in many instances. It then provides as follows:

SECTION 6245-1. "In all such actions hereafter brought, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence is slight and the negligence of the employer is gross in comparison. But the damages shall be diminished in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held in any degree to have been guilty of contributory negligence in any case where the viola-

tion of such employer of any statute or law of the state, or of the United States, enacted for the safety of employees, in any way contributed to the injury or death of such employee unless by the terms of his employment it was expressly made the duty of such employee to report such violation to the employer and the evidence shows that such employee failed so to report and that the employer was not possessed of knowledge of such violation. All questions of negligence, contributory negligence, and assumption of risk, shall be for the jury, under the instruction of the court."

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### OREGON.

[Acts 1911, p. 16.]

A statute of Oregon defines what corporations shall be liable to their employees, and for what they shall be liable, and concludes with the following section:

SECTION 7. "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

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### TEXAS.

[General Laws, 1909, p. 279.]

SECTION 1. "That every corporation, receiver, or other person operating any railroad, shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad; or in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow and children, or husband and children, and mother and father of the deceased, and if none, then of the next of kin dependent upon such employee, for such injury or death, in whole or in part, from the negligence of any of the officers, agents or employees of such carrier; or by reason of any defect or insufficiency due to its negligence, in its

cars, engines, appliances, machinery, track, roadbed, works, wharves, or other equipment: *Provided*, The amount recoverable shall not be liable for the debts of the deceased and shall be divided among the persons entitled to the benefit of the action, or such of them as shall be alive, in such shares as the jury, or the court trying the case without a jury, shall deem proper; *and provided*, in case of the death of such employee the action may be brought without administration by all the parties entitled thereto, or by any one or more of them for the benefit of all, and if all parties be not before the court the action may proceed for the benefit of such of said parties as are before the court."

SECTION 2. "That in all actions hereafter brought against any such common carrier by [or] railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violations by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

SECTION 3. "That in any action brought against any common carrier under or by virtue of the provisions of this Act to recover damages for injuries to, or the death of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

SECTION 4. "That any contract, rule, regulation or devise whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in



any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto on account of the injury or death for which said action was brought."

SECTION 5. "That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under 'The Assumed Risk Law,' enacted by the Twenty-ninth Legislature, and known as Chapter 163, page 386, of the General Laws of the Twenty-ninth Legislature, any other Act or Acts of the Legislature of this state, though in case of conflict this law shall prevail, or to effect the prosecution of any pending proceeding or right of action under the laws of this state."

SECTION 6. "The fact that a conflict may arise between the Federal courts and the courts of this state in construing the Federal [statutes] and state statutes of this state in suits against common carriers by employees for damages on account of personal injuries, creates an emergency, and on inspection public necessity exists that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage, and it is so enacted."

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## WASHINGTON.

[Acts 1911, p. 345.]

The state of Washington has a Workman's Compensation Act which gives a workman injured in extra-hazardous work, their families and dependents, compensation "regardless of questions of fault and to the exclusion of every other remedy, proceedings or compensation, except as otherwise provided in the Act.

## WISCONSIN.

[Laws 1907, pp. 495, 496.]

SECTION 1816. *Crippling or death damages.* "Every railroad company \* \* \* shall be liable for \* \* \* damages \* \* \* for all injuries, whether resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee."

1. *Roadbed and machinery defects.* "When \* \* \* such injury is caused by a defect \* \* \* in any locomotive, engine, car, rail, track, roadbed or appliance \* \* \* used by its employees in and about the business of their employment."

2. *Fellow employees' negligence.* "When such injury \* \* \* shall have been sustained by any officer, agent, servant or employee of such company, while engaged in the line of his duty and which injury shall have been caused in whole or in greater part by the \* \* \* negligence of any other officer, agent, servant or employee of such company \* \* \* in the discharge of, or \* \* \* by reason of failure to discharge his duties as such \* \* \*."

3. *Court's questions to jury.* "In every action to recover for injury the court shall submit to the jury the following questions: *First*, whether the company, or any officer, agent, servant or employee other than the person injured was guilty of negligence directly contributing to the injury; *second*, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; *third*, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employee other than the person so injured; and such other questions as may be necessary."

4. *Comparative negligence.* "In all cases where the jury shall find that the negligence of the company, or any officer,

agent or employee of such company, was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employee so injured shall be no bar to such recovery."

5. *Question for jury.* "In all cases under this Act the question of negligence and contributory negligence shall be for the jury."

6. *Contracts and rules subordinate.* "No contract or receipt between any employee and railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employee shall exempt such corporation from the full liability imposed by this Act."

7. *"Railroad company" defined.* "The phrase 'railroad company,' as used in this Act, shall be taken to embrace any company, association, corporation or person managing, maintaining, operating, or in possession of a railroad, in whole or in part, within this state, whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

8. *Conflict of laws.* "In any action brought in the courts of this state by a resident thereof, or the representatives of a deceased resident, to recover damages in accordance with this Act, where the employee of any railroad company, owning or operating a railroad extending into or through this state and into or through any other state or states, shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state."

9. *Shop or office employees.* "The provisions of this Act shall not apply to employees working in shops or offices."

# INDEX TO FEDERAL EMPLOYERS' ACT.

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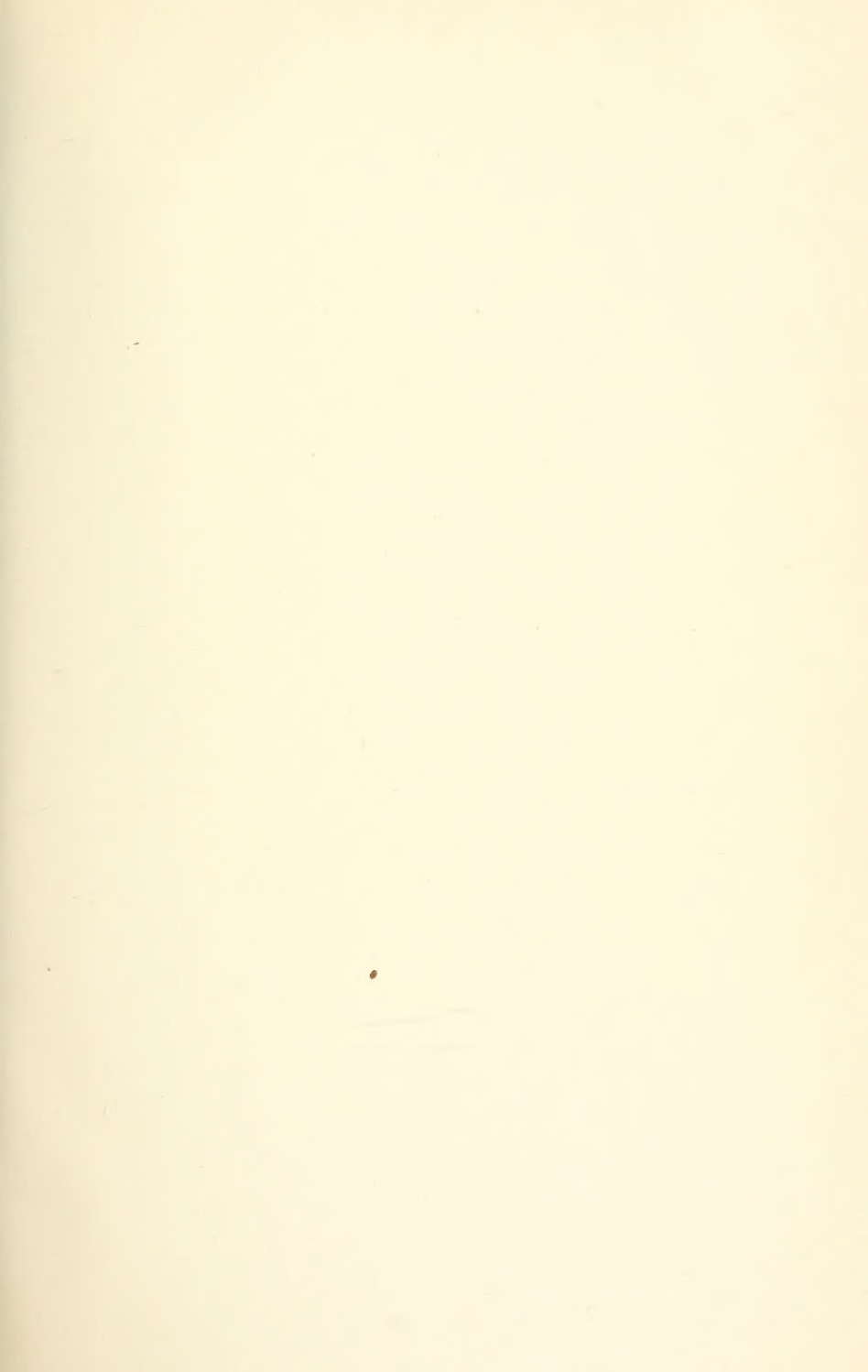












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